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No. 798

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

THE DENVER UNION STOCK YARD COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA AND SECRETARY OF AGRICULTURE.
APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF OF APPELLANT.

ROBERT G. BOSWORTH,
NORMAN A. HUTCHINSON,
WINSTON S. HOWARD,
Counsel for Appellant.

PERSHING, NYE, BOSWORTH & DICK,
Of Counsel.

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OPINION OF THE TRIAL COURT.

The opinion of the trial Court (R 1263) is reported in 21 Federal Supplement at page 83 (advance sheets of December 27, 1937). It is also reprinted in the Statement on Jurisdiction on file herein.

STATEMENT OF THE CASE*

The case arises on direct appeal from the final decree of the specially constituted district court of three judges, which decree (R 1256) was entered December 20, 1937, dissolving the interlocutory injunction theretofore entered by consent (R 353) and dismissing plaintiff's bill of complaint. Petition for appeal was filed January 18, 1938; order allowing appeal entered January 20, 1938 (R 1259); service

* The statement as to Jurisdiction required by paragraph 1 of Rule 12 of this Court, was filed February 15, 1938 and probable jurisdiction noted on March 7, 1938.

of appeal, citation on appeal and all other appellate steps were duly taken.

(a) Statutes Involved.

The pertinent provisions of the Packers & Stockyards Act, 1921; being C. 64, 42 Stats. 159, 163-168, as amended May 5, 1926, C. 240, 44 Stats. 397 (U.S.C.A. Title 7 Secs. 201 et seq) are printed in the appendix to this brief at pp. 102 to 106.

By Sec. 316 of that Act (U.S.C.A. Title 7 Sec. 217) the provisions of laws relating to the enjoining and setting aside of orders of the Interstate Commerce Commission are made applicable to similar proceedings concerning orders of the Secretary of Agriculture. These laws are contained in the District Court Jurisdiction Act being part of The Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Stats. 219, 220 (U.S.C.A. Title 7, Secs. 41 (28) 44, 47, 47(a), 345 (4) and 345 (5). Since the material portions of these latter laws are printed in the Statement as to Jurisdiction and probable jurisdiction has been noted, it is not believed necessary to reprint them here.

(b) Designation of Parties.

The Denver Union Stock Yard Company, petitioner below, appellant herein, will generally be designated in this brief as appellant but may sometimes be called "the company". The appellees are generally referred to jointly as the Secretary or the Government.

(c) Brief Statement of Facts.

The appellant is a corporation organized in 1886. It has continuously since that time conducted at Denver, Colorado, and still conducts there, a stockyard as a public market for livestock, within the definition of Sec. 302 (a) of the Packers & Stockyards Act, 1921. Under the authority of that Act, the Secretary, on February 3, 1930, on his own motion and not on complaint, held a hearing and rate investigation culminating in an order dated July 28, 1931 reducing the rates and charges for stockyard services then

rendered by the company and directing the company to assess and collect a yardage charge against yard traders at one-half the full yardage charge. The company moved to enjoin this order in the District Court of the United States, alleging that the rates were arbitrary and confiscatory. They were so held and a permanent injunction issued. *Denver Union Stock Yard Co. v. United States and the Secretary of Agriculture,* 57 Fed. (2d) 735. The Government did not take an appeal from this decision which thereby became final. That decision was entered April 4, 1932.

The present proceeding was initiated by notice of the Secretary, again on his own motion, and without complaint, dated November 8, 1934 (R 4). Hearing was held thereunder commencing June 3, 1935 and ending July 3, 1935. The evidence introduced at that hearing has been abstracted and is part of the record in this court (R 369 et seq.). On October 28, 1936, the Examiner filed his tentative findings and order (R 22 et seq.), to which appellant, on December 2, 1936, filed exceptions (R 150 et seq.). Oral argument was had before the then Acting Secretary on January 7, 1937 and on February 17, 1937 the Acting Secretary made and entered the findings and order complained of (R 229 et seq.).

In that order, the Secretary classified the properties of appellant as used and useful or non-used and non-useful, made a finding as to the value of the used and useful property, established 6½% as a fair rate of return, reconstructed the income and expense accounts of appellant, and in that manner found that existing rates were unreasonable. By adding his determined reasonable expenses to the fair net return as determined by him, a figure was obtained which he then spread into rates, including in those rates a required half yardage charge to yard traders.

The rate base as fixed by the Secretary is $2,792,700. (R 312), 6½% of which is $181,525.50 (R 319). The amount of expenses found reasonable by the Secretary is $346,545.00 which added to the permissible return gives a total of $528,071.00 (R 333) to be spread into rates. This resulted in a rate reduction. So far as the marketing charges of

appellant are concerned, a comparison of the existing tariff with that prescribed by the Secretary is as follows:

	Rates and Charges in effect		Rates and Charges Prescribed in the Order		
Species	Rail Receipts per head	Truck Receipts per head	Rail per head	Truck-ins per head	Trader Yardage per head
Cattle	$.35	$.40	$.30	$.35	$.15
Calves	.25	.27	.20	.25	.10
Hogs	.12	.14	.12	.14	.06
Sheep and goats	.08	.10	.075	.10	.03
Horses and mules	.35	—	.35	—	.35
Purebred bulls	1.00	—	1.00	1.00	1.00

The rates prescribed by the Secretary are computed at a rate-level such that the product of these rates less reasonable estimated expenses will return to appellant over a four or five year period (R 613), an average net amount equal to 6½% upon the rate base as determined by the Secretary. There is an excess of $2046.00 over the exact 6½% return, but when dealing with millions of head of livestock and thousands of tons of feed annually, this excess is negligible and from a practical standpoint, too small to be spread into rates. We mention this excess because, if Government counsel follow their usual practice, they will urge this as an evidence of the great liberality of the Secretary.

On March 9, 1937, appellant filed its bill (R 1 et seq.) in the District Court alleging that the findings and order of the Secretary in specified particulars is unsupported by the evidence, is arbitrary, confiscatory and deprives appellant, petitioner below, of its property without due process of law in violation of the Fifth amendment to the Constitution of the United States. The three-judge court sustained the findings and order and on December 20, 1937, entered its Findings of Fact and Conclusions of Law to which this appeal is taken.

From the commencement of the proceedings in the District Court and until final determination of this cause, all differences between existing rates and the Secretary's prescribed rates have been and will be impounded, the impounded fund being further secured by a $90,000.00 surety bond.

(d) The Questions Presented. The general question presented, therefore, is whether or not the rates prescribed by the Secretary are confiscatory and deprive appellant of its property without due process of law. The specific questions are:

(1) Does the rate base include a proper allowance for the going concern value of the property?

(2) Is the exclusion from the rate base of the value of the stock show properties within the power and authority of the Secretary? Are his findings supported by evidence?

(3) Is the exclusion from the rate base of the value of the loading and unloading facilities and a portion of the adjoining alleys sustained either by the law or the evidence?

(4) Is the yardage charge to yard traders prescribed by the Secretary at one-half the charge made to other buyers sustained by either the law or the evidence? Does it create discrimination?

(5) Is the exclusion of certain expense items, designated as "Dues, Donations and Subscriptions" sustained either by the law or the evidence?

(6) Is the admitted failure to make any allowance for the amortization of the expenses of the pending rate litigation contrary to law?

(7) Is the land valuation as fixed by the Secretary supported by substantial evidence?

(8) Is a rate of return of 6½% a fair and reasonable rate or is it confiscatory in the instant case?

ASSIGNMENTS OF ERROR TO BE URGED.

The assignments of error are apparently not reprinted in the record but do appear in the Statement of Points to be Relied Upon at page 1277. The errors to be urged may be grouped as follows:

A. Assignments dealing with the exclusion of property or property values from the rate base. These are:

(1) That the Court erred in excluding and failing to make a separate allowance for going concern value. The assignment of error referring to this matter is Assignment No. 8.

(2) That the Court erred in excluding from the rate base the so-called stock show property consisting of the stadium, sales pavilion and other structures together with the land on which these structures are situate. The assignments of error referring to this matter are Assignments No. 5 and 18.

(3) That the Court erred in excluding from the rate base the value of the railroad trackage, loading and unloading docks, chutes, pens and one-half the adjacent alley together with the value of the land on which these structures are situate. The assignments of error referring to this matter are Assignments Nos. 2, 3 and 4.

(4) That the Court erred in finding that the value of appellant's used and useful land is $536,825.00. The assignment of error referring to this matter is Assignment No. 6.

B. Assignments dealing with the exclusion or inclusion of items of income or expense for rate-making purposes. These are:

(1) That the Court erred in directing and requiring a one-half yardage charge to yard traders. The assignment of error referring to this matter is Assignment No. 11.

(2) That the Court erred in excluding from the expense account computations, an average of $3,000. of so-called Dues, Donations and Subscriptions expense. The assignment of error referring to this matter is Assignment No. 12.

(3) That the Court erred in failing to make due allowance for the amortization of the expenses of the pending

rate litigation. The assignment of error referring to this matter is Assignment No. 13.

C. Certain assignments which are cumulative in their nature, in which one or more of the above assignments of error are involved. These are:

(1) Assignment of error No. 1 which attacks the exclusion of 11.618 acres as not used and useful, said acreage being the land excluded on account of the stock show use and the loading and unloading use referred to in A (2) and (3) above.

(2) Assignment of error No. 7 insofar as it attacks the reproduction new value less depreciation of appellant's structural property. This involves assignments referred to in A (2) and (3) above. No attack is made upon the condition percent figure.

(3) Assignment of error No. 9—the total value there found by the Secretary is erroneous if any one or more of the items of excluded property be found to have been erroneously excluded from the rate base.

(4) Assignment of error No. 14 which involves each and all of the errors referred to in paragraphs A and B above.

(5) Assignments of error No. 15, 16, 19 and 20 wherein the conclusions of law that the Secretary's order does not confiscate appellant's property; that the rates are fair, just and reasonable and that the yardage charges are fair and reasonable, are asserted to be erroneous. These conclusions of law are grounded upon the alleged erroneous findings above attacked.

D. Certain other assignments of error which are general in their nature. These are:

(1) Assignment of error No. 10 under which it is alleged that the Court erred in finding that 6½% is a fair rate of return on the rate base of $2,792,700.00.

(2) Assignment of error No. 21, namely, that the Court erred in concluding as a matter of law that the plaintiff's

cause is without equity, the temporary injunction heretofore granted should be dissolved, a permanent injunction denied and the petition be dismissed with costs to the defendants.

(3) Assignment of error No. 22, namely, that the Court erred in denying the petition of the appellant for a permanent injunction.

(4) Assignment of error No. 23, namely, that the Court erred in entering final judgment and decree dismissing the petition of the petitioner, appellant herein.

SUMMARY OF ARGUMENT.

I.

The finding of the Secretary and of the trial court that the valuation of appellant's land and structural property upon the basis of the cost of reproduction new less depreciation of structures and present value of land, includes an adequate allowance for the element of going concern value, is not supported by the evidence. The record shows that the land was appraised as bare land, stripped of all improvements and that the structural property was valued upon the basis of unit costs of material and labor plus certain construction overheads. No additional allowance in the total valuation can be pointed to as being the equivalent of the going concern value of appellant's property, the existence of which value the court and the Secretary admit. The evidence of record contains clear and convincing proof that this value is not less than $325,000.00. The exclusion of this element of value from the rate-base is, therefore, contrary to law and confiscatory.

II.

The stock show is a stockyard facility in that livestock in large volume is handled in commerce at and by reason thereof. The structural facilities plus the land devoted to this use are owned by appellant, are part of its plant and equipment and are admittedly not excessive.

The evidence shows that the stock show is of direct benefit to the entire industry and is undertaken and supervised by appellant. The excluded properties are only part of those devoted to stock show use during the annual period of the show, over half of appellant's entire yard being utilized for that purpose at that time, yet no part of this additional property is excluded. The evidence demonstrates that the show is, furthermore, productive of a large income to appellant, and it is a wrongful invasion of the managerial function to prohibit to appellant the right thus to stimulate its business and to benefit the industry upon which this business is dependent.

Furthermore, even if the property could be held to be not a stockyard facility, the action of the Secretary and of the court is still erroneous because the income derived directly from the show has not been excluded from the income accounts of appellant. When the value of property is excluded from the rate base, income derived from such property must likewise be excluded and disregarded in determining the reasonableness of present or future rates. Failure to do so renders doubtful the jurisdiction of the regulatory body.

We rely upon the fact that the facilities are stockyard facilities within the meaning of the governing Act, but whichever view of the matter may be taken by the Court, the finding is erroneous and cannot stand.

III.

It was error to exclude from the rate base the value of the railroad trackage, loading and unloading facilities and the area upon which these facilities front. It is not the fact that charges for the use of these facilities at the Denver market are, in the majority of instances, included in the freight rate. Section 15(5) of the Interstate Commerce Act, does not change the nature of these facilities which, under the evidence, are essential for the handling of livestock in commerce and therefore a stockyard facility, the value of which should be included in the rate base of appellant.

IV.

The finding of the Secretary and of the court that a large section of appellant's property is set aside free of charge for the use of the yard traders is contrary to the evidence. It is upon this erroneous basis that the Secretary concludes that our existing practice and rate schedule are discriminatory and orders in a charge against yard traders approximately equal to one-half the marketing charge assessed against producers. It is no criterion that such a charge may be in effect at other markets where conditions are entirely different. The management of appellant is opposed to such charge and has not assessed it at any time during the 52 years of its business history. The Secretary's order, in fact, creates a discriminatory situation which does not now exist and in addition, constitutes an interference with the sphere of management entrusted by law to the directors of the company.

V.

Neither the court nor the Secretary is empowered by law to strike from the income account of appellant, items of business expense and charitable donations, which charitable donations the evidence shows were made to organizations, the activities of which are connected with the welfare of appellant's employes. The amount of these donations and miscellaneous business expense is so small as to negative any question of extortion or abuse of discretion. The findings are arbitrary in the extreme.

VI.

The findings and order of the Secretary, approved by the trial court, are erroneous in that no provision is made for amortizing the costs and expenses of the pending rate litigation over any reasonable period in the future. That this is proper and should be allowed is sustained by the decisions of this Court and of other courts.

VII.

There is substantial evidence sufficient to support the Secretary's findings as to land values if one who has never appraised any land in or near the locality, has never as-

sembled an industrial tract, and made no effort to determine the value of other large industrial tracts in the locality, is a qualified witness. The degree of knowledge which qualifies a witness to express his opinion as to value of land is not dependent upon educational qualifications or what might be termed "text book knowledge". A farmer or neighbor is generally permitted to so testify. The basis of the qualification is knowledge of local conditions. This knowledge covering a 25 to 38 year period was possessed by appellant's appraisers whose testimony was disregarded by the Secretary while adopting the appraisal of the government engineer who admitted a lack of this knowledge. This latter evidence is, therefore, not substantial and the findings based thereon are erroneous.

VIII.

The rate of return of 6½% under all prior decisions is a confiscatory rate of return. Whether conditions have so changed as to render this non-confiscatory is the question. The government introduced no evidence showing that a similar rate of return was proper in any similar business with like hazards. A 7% return was provided by the Secretary at the St. Joseph yards. The industry is highly competitive and appellant does not have the protection of a franchise or other governmental grant.

ARGUMENT.

In discussing the questions presented, two sections of the Packers and Stockyards Act, 1921, are of particular importance, and, although all of the pertinent sections have been reprinted in the appendix to this brief, we print those two sections here. The italicized portions contain the words to which we direct special attention:

> §201. "Stockyard owner"; "stockyard services"; "market agency"; "dealer"; defined. When used in this chapter—
>
> (a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the *receiving*, buying or selling on a commission basis or otherwise, *marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce*, of livestock; (Aug. 15, 1921, c. 64, §301, 42 Stat 163.)

§202. "Stockyard" defined; determination by Secretary as to particular yard. (a) When used in sections 201 to 217, inclusive, of this chapter the term "stockyard" means any place, establishment, or facility commonly known as stockyards, *conducted or operated for compensation or profit as a public market*, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. Sections 201 to 217 inclusive of this chapter shall not apply to a stockyard of which the area normally available for handling live stock, exclusive of runs, alleys, or passage ways, is less than twenty thousand square feet. (Aug. 15, 1921, c. 64, §302, 42 Stat. 163).

The determination of many of the questions which follow is dependent upon whether or not the excluded properties are stockyard services or facilities within the meaning of the Act. It is likewise important to bear in mind that conducting a public market is made the distinguishing feature of a livestock yard over which the Secretary has jurisdiction under the Act.

I

THE RATE-ORDER OF THE SECRETARY FAILS TO INCLUDE IN THE RATE BASE ANY ALLOWANCE FOR GOING CONCERN VALUE, ALTHOUGH ADMITTING THAT SUCH VALUE DOES EXIST IN APPELLANT'S PROPERTY. THE FINDING OF THE

SECRETARY AND OF THE TRIAL COURT THAT THE VALUATION INCLUDES THIS ELEMENT IS CONTRARY TO FACT.

The assignment of error to which this portion of the brief is chiefly addressed, is assignment No. 8.

The Order of the Secretary states (R 309):

> "Respondent's stockyard is a going concern. It has a long history of effcient and economic management which has won for it a reputation of rendering good service. It has been financially successful. . . . There is nothing in the entire testimony which indicates that any witness testifying on any subject had any other thought than that respondent is a going concern."

The trial court, in its opinion uses similar language (R 1268):

> "The Secretary recognized that the respondent stockyard was a going concern with a long hisotry of effcient and economical management and financial success. Likewise he calls attention to the fact that it has never defaulted on its bonds and has paid dividends on the preferred stock continuously since 1917 and on the common stock since 1913, with the exception of three years."

Both the Secretary and the trial court adopt this reasoning as the basis for their ultimate finding that the reproduction new value, less depreciation, of appellant's property includes going concern value. This reasoning is specious. The problem presented to a rate-making body is not the valuation of a dead concern nor the valuation of junk. The fact that the utility is operating, i.e. is a "going concern" in the sense used by the Secretary, is the fact which calls into operation the processes of the regulatory body or board. The admitted fact that all witnesses recognized that the company was and is a going concern is beside

the point. The question is whether or not an amount of money equal to the fair present value of this element of property was included in the rate-base of appellant. If it was, then the order of the Secretary, and the decree of the[1] trial court upholding it, are beyond attack on this ground. If not, then the order is confiscatory[2] and the decree is erroneous.

In paragraph 137 of the Order of the Secretary (R 311), the following finding is made:

> "In adopting the cost of reproduction new less depreciation of structures and the value of land, as heretofore found with respect to structures, equipment and land, consideration has been given to the element of going concern value. Adequate allowance for the element of going concern value has been included, although no separate item on its account has been set forth."

This finding is contrary both to law and to the fact.

The valuation of land on the basis of actual present value as bare land and of strucutres on the basis of reproduction new cost less observed depreciation, even though the total value thus obtained be in excess of any junk or wreckage value, does not include an allowance for the value of the business as a going concern. In *Denver Union Water Co. v. Denver,* Equity No. 6274, (no reported opinion) the District Court adopted the findings of the Special Master which expressly so held. That decision was subsequently affirmed by this Court. [3].

We do not contend that a separate allowance must be made, if an additional value covering this item has in fact been included in the rate-base. It makes no difference by what name such additional value is called so long as it is present. This is the gist of the decision of this case in *Los Angeles Gas & Elec. Corp. v. Railroad Commission,* 289

Note 1—Los Angeles G. & E. Corp. v. RR. Comm., 289 U. S. 287.
Note 2—Denver Union Stock Yard Co. v. United States, 57 Fed. 2nd 735.
Note 3—Denver v. Denver Union Water Co., 246 U. S. 178.

U.S. 287.[4] No similar allowance can be found in the valuation of the Secretary in the instant case.

It is admitted, or will not be gainsaid, that the Secretary adopted *in toto* the valuation of land and structures of Government witness Zelinski. The testimony of this witness, therefore, as to the basis of his valuation is important.

A. *Land Values.* The basis of the government valuation of land is that the land involved is stripped of all improvements, is vacant and unimproved, and consists of one unified tract of 130.57 acres in area. [5] The following quotations from the evidence are from the testimony of Witness Zelinski, whose valuation was adopted without change by the Secretary. [6] The references are to the agreed abstract of evidence, which is part of the record herein. Italics are ours.

Note 4—In the Los Angeles Gas case, the Court found that the Railroad Commission had included in the rate base a valuation of $3,000,000.00 on gas properties and gas facilities no longer used by the company, and had added to the cost figure of the properties $4,760,000.00. It was also found that the Commission's valuation included original organization costs and franchise values as well, which are items frequently excluded from rate valuations. Further analyzing the evidence, the Supreme Court found that after making certain adjustments in overhead percentages, and making an allowance for working capital, there remained $5,618,235.00 in excess over historical cost allowed by the Commission as the rate base value. The Court said (289 U. S. 287, 317).

> "... this excess amount of over $5,500,000 can appropriately be assigned to elements of value which may not have been fully covered. The record affords no adequate basis for criticizing the allowance made by the Commission for materials and supplies and working capital, and thus the entire excess may be regarded as applicable to whatever intangible value the property had as a going concern. *The fact that this margin in the rate base was not described as going value was unimportant, if the rate base was in fact large enough to embrace that element.*" (Italics ours)

The Supreme Court then goes on to find that the Company had not substantiated by evidence any larger going concern value than this excess amount allowed by the Commission.

Note 5—The appraisal by Government Witness Zelinski was as of January 1, 1935 and covered 131.045 acres. Between the date of that appraisal and the date of the hearing the appellant sold 0.475 acres, leaving a balance of 130.57 acres, which latter is the total figure appearing in various places throughout the Secretary's report.

Note 6—c.f. column 1 of tabulation, (R 297) with Government Exhibit 23, first unnumbered page entitled "Summary of Land Appraisal".

(R 463) "I valued the lands of the Stock Yard Company *as naked, unimproved, vacant lands,* stripped of all improvements which we inventory in our engineering report. I considered the situation of adjoining property unchanged, with all buildings thereon in place."

(R 464) "In general the method used in appraising the lands of the Denver Union Stock Yard of Denver, Colorado, has been that laid down and approved in the Minnesota rate cases, which is a method of valuation applicable to the appraisal of public utility or quasi-public utility properties. *It has been the endeavor of the appraiser to base his values upon the values of similar adjacent and/or adjoining property.*"

(R 477) "It should not be overlooked, however, that for the purpose of comparing the values of the property with the sales of units comparable to the integral portions of which the yards are now comprised, it is necessary to take into consideration the lack of dedicated public streets and alleys to serve so large an area."

(R 483) "Yes, I make the statement on page 13 of my report that it is necessary to take into consideration the lack of dedicated streets and alleys. *I took that fact into consideration because in going on the concept that these lands are stripped of all improvements that are upon them, naturally the roadways which we have inventoried in our engineering report are considered stripped off the property, so that the area becomes a very large area without any access shown.*"

(R 495) "Where I spoke of the absence of highways in the tract, I meant an absence of dedicated public streets. The absence of dedicated streets under certain circumstances can be an advantage in connection with the tract for a large industry but is not always so. *You must remember I am valuing this property not for the special use and not in the special way that the Stock Yard Company is using it,* but I am considering its

availability for a stockyards use and stripped of these improvements I am trying to visualize the effect of the lack of direct access to a large portion of the area, which I think should be considered in the valuation."

Bearing in mind that it was the valuation of this witness of the land of appellant which was adopted by the Secretary, it is manifest that that valuation was on the basis of an appraisal of vacant and naked land stripped of all surface and subsurface improvements, even stripped of roadways and alleys which give access to every portion of the tract and make it a veritable checkerboard. It is likewise manifest that the appraiser, having stripped the land of these roadways and alleys, further discounted the value he otherwise might have found because "the area becomes a very large area without any access shown."

No warrant for such further discounting of values can be found in any case or text book. We are not here discussing the valuation as such. Objection thereto is taken and argued hereafter. [7] What we do point out is that this method of valuation of the land leaves no excess to be attributed or allocated to going concern value. So far as the land values are concerned, therefore, the findings of the Secretary and the trial court that an excess allowance for going concern value is included in that valution is manifestly contrary to the evidence.

B. *Structural Values.* Appellant accepted the figures of the Government witness on the reproduction new cost of the structural property. It did not accept the Government figure on reproduction new cost less observed depreciation, as we point out hereafter. The Secretary adopted both these figures of the Government valuation engineer.

The basis of the valuation of the structural property by the Government witness was the unit cost of the materials and labor entering into the structures plus certain construction overheads, as is apparent from the following extracts from the record:

Note 7—*infra* p. 93.

(R 485) "When we came in January we retained for a temporary period, a group of young men to assist in the so-called manual labor phase of preparing the inventory. I assigned a portion of the inventory to be taken by each one of the engineers from our Kansas City office and my assistant, Mr. Galbreath, collected the price data and labor cost data. While here he interviewed some material men, building contractors, labor union officials and others to secure the necessary information for a proper pricing of the inventory. . . . When all these data had been compiled, it was typed up in a report form and the price extensions, quantities and prices on labor and material are shown in a series of reports which we have prepared for introduction into this hearing."

(R 522) "Taking for example Hay Barn No. 3, which is listed in Government Exhibit 28, page S-6, under item Y-3, with a total reproduction new cost of material and labor of $13,372, that reproduction new cost was arrived at by taking the inventory which was assembled and pricing out the various classes of material on a basis of unit cost per yard or thousand feet of lumber, per thousand of brick and then priced out separately the labor which it would take to install that quantity of materials. Yes, "CY" means cubic yards and "SF" square feet. The prices for the material are taken from a schedule which we built up, by sending out price lists to local dealers to give us an estimate as to what they would deliver us material for on the site of the job either by truck or rail. In lumber, due to the different sizes, etc., we worked out a weighted average price per thousand feet. The abbreviation "m b m" means thousand board measure.

On page 395 common brick is given at $18.80 a thousand delivered on the site and that includes some labor of loading and unloading as well. The labor incident to moving the brick, for example, from where it was unloaded to the job, is priced in the labor and is not included in the material cost.

Yes, the labor cost of $13.95 is the labor cost per thousand brick and is worked out from our formula in the working papers. It does not include superintendance or any of the general overhead or construction overhead. No, my inventory, or detailed inventory is not in the record. Yes, our staff did actually inventory the number of two by fours according to their best judgment, and the number of various sizes of lumber, the squares of brick, etc. When it came to the cattle pens, where a typical pen could be used we figured the lumber in that, the paving and the drains, and then multiplied all that by the number of typical pens in the same area. Where we couldn't do that the special measurements for the particular pen were taken and the quantity of lumber computed for that. We made up a schedule of the lumber or any material to build a typical pen or a typical gate, and then priced out all that we thought were typical on that basis, and then multiplied that by the number of typical pens or typical gates to get the reconstruction new cost. The same applies to the sheep barn and to other units of property."

Government exhibits 29 and 30, being volumes 1 and 2 of the report of the Government witness, show in detail the application of unit prices to the number of units found, under the above method. Typical pages are reprinted in the appendix of this brief, pp. 108 to 110.

To the cost of reproduction new of the materials and labor thus determined, the witness added, and the Secretary adopted, certain general and construction overheads as follows:

Omissions and contingencies	5%
Engineers' and Architects' fees	5%
Legal expenses during construction	1%
General salaries and expenses during construction	2%
Fire insurance during construction	½ of 1%
Interest during construction	3½% or ½ year at 7%

The application of these percentages to the reproduction new cost of the structures found used and useful by the Secretary resulted in a total cost of reproduction new of the structural property of appellant of $2,532,484.00 (R 305). To this total, the Secretary then applied his condition percent figure of 80.545%, thus computing the reproduction new cost less depreciation of the used and useful structural property as found by him to be $2,039,789.00 (R 306).

We submit that where structures are valued on the basis of existing unit costs of so-many board feet of lumber, squares of cement, 1000-brick, etc., there is no such extra allowance made for going concern value as was found in the Los Angeles Gas case supra. [8] The trial court erred in finding such an allowance in the construction overheads (R 1253). Engineers' and architects' fees are as much a part of building costs as the foundations of the building itself. No sensible person would commence construction without a reasonable allowance to cover omissions and contingencies which always occur to augment the cost of the structure. Interest lost during the construction period on the money expended in construction, is figured by every business man as part of the cost of doing the work and the same is true of fire insurance premiums paid out to protect the capital outlay.

These items are not tantamount to going concern value. Such items have been allowed in the following cases in each of which a separate allowance was made for the going concern value of the business or plant: [9]

Note 8—see note 4, p. 15.

Note 9—In the Denver Water case, 12½% of the "fair contract cost" was allowed for overheads and in addition $800,000. for going concern value. See report of Special Master Chinn, approved by this Court. In the Indianapolis case, as appears from the reports in P.U.R. 1923 D 473 and 1924 B 306, 15% was allowed for construction overheads and $1,416,000. for going concern value. In the Los Angeles case, $2,117,235. was included for overheads and an excess allowance of $5,618,235. found in the Commission's rate-base, which this Court held adequate to take care of going concern value.

In both the Dayton Power & Light case, 292 U. S. 290, and the St. Joseph Stock Yards case, 298 U. S. 38, allowances for general construction overheads were included, but going concern value allowance denied because not proved. These cases are, therefore, not contra.

Denver v. Denver Union Water Co. 246 U.S. 178.
Bluefield Waterworks Co. v. P. U. C. 262 U.S. 679.
McCardle v. Indianapolis Water Co. 272 U.S. 400.
Los Angeles Gas & Elec Corp. v. RR. Commission 289 U.S. 287.

Furthermore, the method followed by the Secretary is inconsistent with the existence of any added sum being included in the appellant's rate-base to cover the going concern value of its business. The Secretary first found the present value of the land deemed used and useful by comparison with sales of adjacent property, then he determined the structural value on the basis of unit costs of material and labor plus construction overheads. This total he then discounted 19.455% upon the finding that the structural property of appellant was 80.545% as good as new (R 304). If the valuation of the land and structural property includes the going concern value of appellant's plant, then this value has been depreciated approximately 20%. *Going concern value is not a depreciable or wasting asset in the absence of proof, in the present case, that the market is retrogressing.* The record is devoid of any such proof.

The only evidence of record upon which Government counsel rely to sustain the Secretary's finding in this matter is the answer of Witness Zelinski, the Government valuation engineer, toward the end of his testimony (R 493), but before this answer can be properly interpreted, it must be viewed in the light of his entire testimony. Mr. Zelinski had testified that he had valued the land of appellant as bare land, stripped of all improvements, both surface and subsurface, on the basis of adjacent property sales, and had discounted that value in his mind both because of the absence of dedicated streets and alleys in so large a resulting tract, and because the presence of packing and slaughter houses adjacent thereto prevented consideration of higher values which might adhere to the land if it were available for "an alternate industry, which is of a higher character than the stockyards company" (R 553). The witness, as we have seen, then valued the structural property on the unit cost

basis. Having testified to all this, Government counsel, at the end of the direct examination asked the witness (R 493).

> Mr. Miles: Mr. Zelinski, in valuing the stockyard property, did you reach your conclusion based upon material in place, also on a property that is able and willing to function as a stockyard and as a business earning an income?
>
> A. I did.

The only possible interpretation of this answer, consistent with the testimony, is that the witness valued the property as of the present day value of land and structures, and not as junk, and in that sense "able and willing to function as a stockyard." This does not include an allowance for going concern value.

The question is squarely presented in this case as to whether or not, under any circumstances, it is possible for a stockyard to prove going concern value. Digressing slightly for a moment, we admit that there may be a question in the case of a true public utility, in view of the governmental grant of a monopoly, whether or not there is ever in fact a going concern value to be computed in a rate investigation of such monopoly. Take for example, a water company, a gas company, an electric company or even a telephone company. These exercise a governmental function, receive a governmental grant of a franchise right, and before any competition is permitted, a certificate from governmental authority of convenience and necessity must be obtained by the competitor. Hence, any going concern value in such case is attributable to the public or franchise grant and the government perhaps is entitled to disregard such value in fixing the rates its public shall pay. A stockyard company, however, exercises no governmental function, has no monopoly or franchise grant, and is in an extremely competitive industry. It is not a true public utility, but rather, a business so affected with the public interest as to justify regulation. That element of value, known as going concern value, is attributable in a stockyard company, therefore, to the successful functioning of the assembled plant and not to mere readiness to serve.

To put this slightly differently, any one desiring the use of water, gas or electric lighting must go to the water company, the gas company or the lighting company in the community. To a very large extent, its business is attached when it commences to function. That is the result of the monopolistic governmental grant or franchise. The service cannot be obtained elsewhere. Hence, when such a utility is assembled, has the grant and is ready to function, every element necessary to the determination of a fair rate-base is present. That is not true in a competitive industry which exercises no governmental function.

That the business of appellant is highly competitive is amply supported by the record (R 663, 813, 814-819). Appellant is in competition with the markets at St. Joseph, Mo., Omaha, Nebr., Kansas City, Mo., Chicago, Ill., and Los Angeles, Calif. to any one or more of which markets the grower in this territory can and is constantly solicited to ship his livestock. The appellant is in competition with the growing practice of direct buying. It is in severe competition with auction sales. To develop and attach business to its plant, appellant has made capital outlays and successfully acquired "business assets" which are not present in or required of a public utility operating under a franchise and which are not reflected in any valuation of appellant's lands and structures on the basis of reproduction new cost less depreciation. This is not the capitalization of past deficits as criticized by this Court in the Galveston Street Railway case [10] but rather the recognition of actual values.

In the St. Joseph Stockyards case, [11] this Court did not hold that the valuation of that company's property on the basis of reproduction new cost less depreciation included going concern value, but merely that the company had not

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Note 10—Galveston Elec. Co. v. Galveston, 258 U. S. 388, 393-397.

Note 11—St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38 at 64.

> "The decisive point on this appeal is that in seeking a separate allowance for going concern value, in addition to the value of the physical plant as found, and in maintaining that the property was being confiscated because of the absence of that allowance, it was incumbent upon appellant to furnish convincing proof. That proof we do not find in the record."

given convincing proof that its property was being confiscated by failure to allow it. The St. Joseph Company contented itself chiefly with the hypothetical theory of the reconstruction cost of attaching business, offered by Mr. Howson, and urged that the Secretary was estopped by reason of the separate allowance made in the former hearing of the same cause. The probative value of the Howson theory and the legal effect of the prior allowance were denied by this Court, leaving the record devoid of the requisite proof.

In the case at bar, the proof of record is as follows:

1. *The nature of appellant's business.* This has been misconceived by the trial court. Appellant is not in the business of conducting an hotel for cattle, sheep, hogs and horses. If it were, it would not be before this Court because the Department of Agriculture under the Packers and Stockyards Act, 1921, does not claim and has never exercised jurisdiction over feed yards. [12] No charge is made to the producer at Denver for the use, as such, of the pens or other facilities. The charge made is a marketing charge collected only in the event of sale of livestock, and the charge is the same whether the livestock has used the pens for five hours or five days. It is a charge for the privilege of the market (R 419, 846, 891). The distinguishing characteristic is the market which appellant has succeeded in establishing and maintains at its yards. The value of this market is not reflected in the reproduction new cost of the physical structures. The comparison is to any security or commodity exchange, with this distinction, that due to inherent differences in our commodity by reason of sex, age, weight, type and species, livestock must be physically present and open to inspection of the purchaser or his agent, when sold, hence the pens, feed and water are necessary. This leads to a larger plant investment than is necessary in other commodity markets, but the value of the market is over and above the value of or investment in that plant. The fact that ap-

Note 12—By Section 202 (a) of the Packers & Stockyards Act, 1921 (see Appendix p. 103) the Secretary has jurisdiction only over such stockyards as are conducted as a *public market*.

pellant has been successful in creating and establishing a market with a strong buying demand is amply proven of record[13] and, in fact, is not denied by the government.

2. *Cash outlays and other grants and expenditures in building the market.* These cash outlays, grants and expenditures are scheduled in Respondent's Exhibit No. 15, which has been recopied in the appendix to this brief at p. 111 hereof. The explanation thereof is given in the testimony of Asst. General Manager Pexton (R 847-856). These expenditures and grants of land and cash total $325,547.10 including interest at 6% on land acquired for the purpose, from date of acquisition to date of gift. By reason of a part of these expenditures (R 855), three of the large packers, namely, Armour, Swift and Cudahy, have large plants at Denver and are a large part of the buying demand on appellant's market.

3. *Sale-in-Transit and Sorting Privileges.* Under the sorting privilege, cattle of various owners arriving by rail for the same market session from different shipping points, may be sorted in such a way as to result in uniform carloads which on sale may move to the new destination on the through rate from point of origin to such destination. This privilege is not open at any Missouri River market or at Chicago.

For example, assume Shipper A, with his shipping point Grand Junction, Colorado; Shipper B, with his shipping point Rifle, Colorado; and Shipper C, with his shipping point Gunnison, Colorado; all those points being on the same carrier's lines. Assume that each ships to Denver, a mixed car of cattle containing ⅓ grass fat steers, ⅓ yearling feeders and ⅓ nondescript old stuff known in the industry as "canner cows". When these shipments arrive at Denver for the same market session, they are speedily sorted, the grass fat steers from each shipment making one carload of slaughter type

Note 13—Witness Pexton (R 809, 856).

cattle and the yearlings making a carload of feeder type. Suppose the fat load is purchased by a packer at Austin, Minnesota, and the feeder load by a fattener in Missouri. The through rate from Grand Junction, Colorado, to Austin is $50.24 less per car than the combination of local rates—Grand Junction to Denver and Denver to Austin. In the case of the feeders, the through rate is $48.00 less per car than the combination of locals. Under the sorting privilege, with sale-in-transit, these two shipments would move out at the through rate. The purchaser, because of this saving in freight rates can afford to pay and does pay more for cattle which can be moved out on the through rate (R 948, 995). and the market is fostered thereby. These sorting and sale-in-transit privileges, and their effect upon the market are in evidence and fully explained (R 947-949). Government witnesses recognized their value (R 470, 1214). It cannot be denied that this sorting privilege is one of the assets of appellant's market which is not reflected in a "reproduction new cost" valuation of appellant's land and structural property. Appellant expended more than $14,000.00 in 1933 in defending and maintaining these privileges (R 324).[14]

4. *Increased percentage of sales to receipts.* Bearing in mind that the marketing charge is made and collected by appellant only when livestock received is sold at Denver, the strength and value of the market is indicated by the percentage of sales to receipts. Respondent's Exhibit 5 gives this information (Appendix p 112). It shows that in the 20 years from 1913 to 1933, the percentage of sales to total receipts had increased in cattle from 51% to 93%, calves from 57% to 76%, sheep from 39% to 71% (R 809). Impressive as these figures are, they are even more impressive when receipts are considered. Receipts of sheep at Denver in 1913 were 620,431 head, and 39% means that 241,968 head were sold on the Denver market that year. In 1933, the receipts of sheep were 2,902,316 of which

Note 14—198 I.C.C. 73.

71% or 2,060,644 head were sold on the Denver market. Receipts and sales for the year 1934 are shown on the Exhibit but are not considered indicative because of the government purchasing program on drought livestock in 1934, pursuant to which the government purchased over 8,000,000 cattle and calves and 3,500,000 ewes (R 820) a considerable amount of which were shipped to packers located at the stockyards for contract slaughter. These were counted in the receipts and made the receipts for that year abnormal. The appraisal of physical property on any reproduction new basis, even though "ready and willing" to function, cannot and does not reflect the going concern value of such a market.

5. *Hyder's estimate.* Mr. Hyder, called as witness by appellant (R 1050), is vice-president of American Appraisal Company, a trained engineer with large experience in the valuation of public utilitiy properties (R 1054) and with 15 years' experience with and knowledge of stockyards (R 1055) and particularly with the appellant's stockyard (R 1056). Mr. Hyder is described by the Secretary as an expert "thoroughly competent and widely experienced" (R 298). After defining and distinguishing between construction overheads and intangible property values (R 1058), Mr. Hyder testified at length upon the subject of the going concern value which in his opinion, should be included in appellant's rate-base (R 1090-1103). He named as elements of going value, over and above the physical properties, and not possessed by a new property, an established market, an established volume of business, a trained, efficient and established management and personnel, developed records essential to successful operation and lastly, established credit (R 1097).

With regard to the value to be placed on these elements, the witness testified (R 1100 et seq) that in his opinion, the elements of going value were worth not less than $10.00 per car of the normal annual volume of 35,000 cars or $350,000.00. True, this is only a guess,

but like all other pertinent expert testimony, it is the opinion or guess of a person qualified by special knowledge and experience to hazard an opinion. [15]

The evidence, summarized in paragraphs numbered 1 to 5, inclusive, above, is convincing proof of the going concern value for which a separate allowance of not less than $325,000.00 should be made in this case. The government offered no evidence of going value either as to its existence or non-existence. The Secretary admits it exists in appellant's plant and business. The testimony establishes beyond the shadow of a doubt that the land was valued as bare land and the structures as the aggregate of so many units of material and labor. That method of valuation cannot include an allowance for going value.

We reiterate that unless the proof in this case constitutes clear and convincing proof within the requirement of this Court in the St. Joseph Stock Yards case, [16] then no satisfactory proof can be made in a case of this nature. Hence, we submit that the question presented is whether or not in a rate case, as distinguished from a plant-acquisition case, any separate allowance for going concern value, is to be made in the rate base. The Court has never held such an allowance unnecessary. [17]

Note 15—The stockyard experience of this witness is fully set out in the record at pp 1094-1095. The basis for his estimate is clearly stated in his testimony (R 1100-1103).

Note 16—298 U. S. 38 at 64, cited *ubi supra*.

Note 17—Rate cases where separate allowances made—Denver v. Denver Union Water Co., 246 U. S. 178; Georgia Ry. & Power Co. v. Commission, 262 U. S. 625; Bluefield Water Works Co. v. Public Service Commission, 262 U. S. 679; S. W. Bell Telephone Co. v. Public Service Commission, 262 U. S. 276; Ft. Smith v. S. W. Bell Telephone Co. 270 U. S. 627; McCardle v. Indianapolis Water Co. 272 U. S. 400; Westinghouse Elec. & Mfg. Co. v. Denver Tramway, 3 Fed. (2d) 285, 298 (certiorari denied 278 U. S. 616.)

Case recognizing an extra allowance as being the equivalent of going concern value, hence no separate allowance made; Des Moines Gas Co. v. Des Moines, 238 U. S. 153; Los Anegeles Gas & Elec. Corp. v. RR. Commission, 289 U. S. 287.

Cases where separate allowance was denied for lack of appropriate proof: Galveston Elec. Co. v. Galveston, 258 U. S. 388, proof only of capitalization of past deficits; Cedar Rapids Gas Co. v. Cedar Rapids 223 U. S. 655, only proof was of franchise monopoly value; Dayton Power & Light Co. v. Pub. Util. Comm. 292 U. S. 290, failure of proof to show that recent merger of two reorganized concerns gave rise to going value; St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38, complete failure of proof.

In Westinghouse Electric & Manufacturing Co. v. Denver Tramway Co., 3 Fed. (2d) 285 at 298 (certiorari denied 278 U.S. 616) Circuit Judge Robert E. Lewis, then district judge, held:

> "There remains to the added an amount for going concern value. On this subject the City declined to offer any proof. The lowest amount named by a witness for the receiver was $2,900,000, and the highest $4,500,000. The master allowed $1,500,000. The receiver says he does not know where the master got this amount, and there is no evidence to support it. . . . I see no escape from accepting the lowest amount named in the testimony. . . ."

This is an evidenciary proceeding and a finding of the regulatory body not based on evidence of record cannot be sustained.[18] Discretion cannot take the place of evidence and where, as in the case at bar, a property having a demonstrated and admitted going value is valued solely on the basis of bare land and unit cost of structures, including construction overheads, it is either an arbitrary exercise of discretion on the part of the Secretary to say that this land and structural value is all the property is worth, or an error of the Secretary in failing to give effect to the evidence of record.

We do not insist that development costs are the measure of going concern value.[19] We do submit that it may be indicative of that value and corroborative of other evidence. We further submit that the fact that exact mathematical computations of going concern value cannot be made is not decisive. The language of the late Judge McDermott in *Denver Union Stock Yard Co. v. United States*, 57 Fed. (2d) 735 at 744 is pertinent:

> "There may be businesses in which it is possible to compute with some degree of accuracy this element

Note 18—U. S. v. Abilene RR. Co., 265 U. S. 274.

Note 19—See Note 10 in dissenting opinion of Butler, J. in Railroad Commission of California v. Pacific Gas & Elec. Co. decided Jan. 4, 1938, not yet officially reported.

of value; *but, even if accurate computation is not possible, a value which actually exists should not be ignored* because of the difficulty of its measurement. There is no rule by which the value of a leg or an arm can be accurately measured in dollars and cents, nor by which pain and suffering can be computed; yet triers of facts do evaluate such things. *By the same token, difficulty of measurement should not amount to a denial or right.*" (Italics ours)

That the failure of the Secretary to make an allowance for going value is confiscatory, is apparent from the record. The rates fixed by the Secretary are designed to produce 6½% net on $2,792,700 . The gross product of the rates upon the average expected volume is $530,117. (R 351) with gross expenses of $346,545 (R 333) and the reasonable return is $181,526.00 (R 319 and 333). Due to the fact that it is impossible to spread rates exactly if complicated fractions of a cent are to be avoided, the rates produce an excess of $2,046.00 (R 351) or a net average return over the next 4 or 5 years (R 613) of $183,572.00.

We submit that the evidence clearly demonstrates that no allowance for the going concern value of appellant's plant and business is included in the valuations adopted by the Secretary and approved by the trial court in this case. The findings are, therefore, unsupported by the evidence and contrary to law. If going concern value in the amount of $325,000., which is the minimum under the evidence of record, be added to the rate-base as found by the Secretary, the rate-base would be $3,117,700., 6½% of which is $202,650. It follows that since the net return allowed by the Secretary's proposed rates is $19,078. short of a 6½% return upon the rate-base including going concern value, the rates are confiscatory and the order cannot stand.

II.

Stock Show Property.

THE FINDINGS OF THE SECRETARY AND OF THE TRIAL COURT THAT THE LAND AND STRUCTURAL PROPERTY COMMONLY CALLED THE STOCK SHOW PROPERTY IS NOT USED AND USEFUL AS A STOCKYARD FACILITY, AND THAT THE VALUE THEREOF SHOULD BE EXCLUDED FROM APPELLANT'S RATE BASE, ARE NOT SUPPORTED BY THE EVIDENCE AND ARE CONTRARY TO LAW, RESULTING IN CONFISCATION OF APPELLANT'S PROPERTY.

A. The Properties are Erroneously Excluded from the Rate Base.

The Secretary, with the approval of the trial Court, excluded from the rate base the following property and its value, all of which property is owned by appellant:

Land in Zone 9, Government Valuation (R 297)		$ 40,143.00
Structures thereon	Reprod. New (R 299)	
Stadium	$176,371.	
Stadium Heating Plant	6,115.	
Stadium Restaurant	6,066.	
Wash House	5,942.	
Sales Pavilion	12,885.	
Hide Storage (Tile barn)	14,845.	
Total Reproduction new value	$222,224.	
Gov't factor of condition percent	80.545%	
Reproduction New Value less depreciation of structures		178,890.00
Total present value excluded		$219,033.00[20]

Note 20—If the land values and condition percent figure of appellant's experts be adopted, the total would be increased to approximately $269,000.00.

The findings of the Secretary relative to this property are contained in paragraphs 68-71 of the order (R 264) where it is determined that the land is not used and useful and that the stock show is not a stockyard facility; in paragraph 75 (R 271) where the general finding is made that structures located on land found by him to be non-used and non-useful are themselves found to be non-used and non-useful structures; and in paragraphs 115 and 118-a (R 297 and 299) where the valuation of the excluded property is given.

The trial court summarized the findings of the Secretary and adopted them in findings 9-12, inclusive, (R 1251-2) as follows:

> "9. 2.633 acres of the land excluded as being not used and useful are occupied by so-called stock show buildings consisting of a stadium, sales pavilion and certain other buildings used in connection with a stock show. Petitioner does not carry on any of its business in these buildings. Petitioner leases this property to the Western Stock Show Association, a Colorado corporation, which operates an annual livestock show on the premises. The expenses of the show are borne in part by public subscription and in part by the receipts from the sale of tickets. Petitioner pays the taxes upon this property and has, in the past, made substantial contributions to cover deficits resulting from the operation of the show.
>
> 10. The so-called stock show property is un-used except at such times as when it is under lease to the Western Stock Show Association or to other parties. The Secretary does not regulate the charges imposed by petitioner for the use of this property. The only time at which the property is used in connection with livestock is during the one week each year that the Western Stock Show Association is occupying the premises and conducting the stock show. The Western Stock Show Association does not pretend to furnish any stockyard facilities in connection with the handling

of this livestock and the Secretary does not attempt to regulate the charges made in connection with the stock show.

11. Whatever benefits result to the livestock industry from the stock show are indirect benefits to the industry as a whole.

12. The stock show property is not used and useful in rendering stockyard services and its exclusion does not affect the value of petitioner's property as an integrated and established enterprise.

For the purpose of clarifying the issues and at the request of the Court, appellant filed certain suggested findings (R 1226) all of which were overruled. The suggested finding relative to this property is as follows:

Stock Show Property. The plaintiff owns the land and buildings on and in which the annual livestock show is held. These buildings are leased for three weeks in each year to the National Western Stock Show Association, a non-profit Colorado corporation which operates the annual livestock show. The expenses of the show, which continues for eight days, are borne by admission fees to the show, admission fees to such other events as may be held during the year, and in some measure by public subscription. Plaintiff assumes the carrying charges, such as interest, taxes and the like, and when the show is unable to pay the rental, plaintiff absorbs the deficit. Large quantities of livestock are entered in the show, and much of it is held, exhibited, shown and sold in the so-called stock show property. Large quantities of livestock also entered in the show are sold in the main portion of plaintiff's yards. The stock show attracts buyers to the stockyards from all parts of the United States and results in a wider outlet for the producer's livestock at all times of the year. It is responsible for a substantial volume of receipts during the stock show period, has contributed to the improvement of the grade of livestock raised, results in better prices,

has educational value, is an excellent advertising medium for the Denver market, and is maintained by plaintiff in good faith and in the belief that it aids and stimulates its business and the business of the livestock producer. The Secretary excluded from the income account of plaintiff only the income received from the stock show buildings proper, and excluded from plaintiff's expense account the taxes and maintenance paid by it.

The Secretary did not allocate to the stock show and exclude from plaintiff's income account any portion of the substantial income from yardage and feed shown by the evidence to be directly attributable to the stock show.

The assignment of error upon which we here rely is Assignment No. 5 wherein appellant asserts that the findings as well as the assigned grounds therefor, are contrary to the evidence, unsupported by the evidence and confiscatory of appellant's property.

The essential facts are not in dispute, and in this regard the case is similar to the 1930 hearing, the final decision in which is reported in 57 Fed. (2d) 735[21] and from which we shall quote briefly in a moment. The only difference on this point is that the evidence in the instant case was more in detail and more emphatic in that it was given to a greater extent by men actively engaged in the production of livestock.

It is undisputed that the facilities themselves are not excessive. Government witness Christensen testified that none of the excluded facilities were excessive or not needed for the show (R 429) and that the stadium is necessary properly to house the show (R 430). In this he was corroborated by Witness Pexton (R 840) and by Witness Farr (R 941). No contrary evidence is of record. Hence the size and nature of the structures are not in issue.

Note 21—Denver Union Stock Yard Co. v. U. S., 57 Fed. (2d) 735.

In the Court's findings above quoted, the Court holds that whatever benefits result to the livestock industry from the stock show are indirect benefits to the industry as a whole. In the Court's opinion (R 1268)[22] it is stated:

"Were we charged with the determination of this factual question, we might, because of the indirect benefits to the industry as a whole resulting from the stock show, feel the question to be a debatable one. But there is substantial evidence pro and con on this issue."

The record does not support either the assertion that the benefit is indirect or the statement of substantial contrary evidence. We challenge Government counsel to point to any such contrary evidence.

The testimony from all producer witnesses was unanimous as to the beneficial effect of the show upon the industry.

Witness Pace, a producer, testified as follows (R 685):

"As to the Stock Show at Denver, I have not missed a one since it was built. We all think it is a benefit to the industry as a whole. It just seems to get a lot more buyers together and a lot more cattle, and it seems every year that the cattle have been improved and more sales and more buyers, and I have heard it said many times that Denver is the best feeder market of any town or place anywhere, produces more good cattle, more good feeders, sold here in the Stock Show than any other one market. Yes, the same thing refers to bulls. It just looks as though there were buyers here from everywhere and there always seemed to be stock for everybody. Sometimes it might run a little short like anything else, and maybe a little long, but not very much. The buyers come from a great many States and buy the livestock by the carload and maybe more. Yes, I think the Stock Show has been influential in bringing buyers to this part of the country and advertising our livestock, because, as we look at

Note 22—Also reprinted in "Statement as to Jurisdiction", p. 9.

it, we are always waiting for the Show to either buy feeders, if we want them, or have them to sell. The same way with bulls and the same way with horses. It just seems that it is a place to get together and do business. I think it is very valuable. . . ."

This same witness testified that the show had personally put him in contact with buyers several times whom he felt he would not otherwise have reached (R 686); that the prices generally average from $1.50 to $2.00 a hundred more than they would on the open market at any other time; and that since the shipper to the market is interested in the outlet for his livestock and sends it there for sale, he is interested in the number of buyers on the market because the more buyers there are the better the prices received. He further testified under cross-examination, (R 695) that the stock men all over the country regard the show as a get-together time and try to have something to sell or that they go there for the purpose of buying; that the stock show has personally been valuable to the witness; that he had always found that he got a good price and generally a better price at the stock show (R 696) because there are more buyers and better sales.

Witnesses Jamison, Mitchell and Farr were three other producer witnesses called by respondent and questioned concerning the stock show.

Witness Jamison is a producer from Arizona with a ranch of 150,000 acres. He testified that he had been familiar with the Denver show for twenty years. His direct testimony on this point appears at (R 794 et seq.) as follows:

Q. In your opinion, is it of benefit to the livestock industry as a whole to have, or to have had this stock show at Denver?

A. I think it is the greatest thing that they have ever had to improve the breeding of cattle and general conditions.

Q. In your opinion, has it had any effect upon the, you might say, the advertisement of the western, you might say, mountain type of cattle?

A. I think it is about the only advertisement we have ever had that has done us any good.

Q. Do you know or can you state whether or not buyers have been attracted to the market which have become permanent buyers, say, of your livestock?

A. They sure have, lots of them.

Q. And have been attracted by reason of the show, you feel?

A. Yes, sir.

Q. Do you think the stock show has had any effect upon prices paid for cattle?

A. It certainly has.

Q. In what way and to what extent do you feel that?

A. Because it has encouraged the people to raise a better grade of cattle and naturally they bring better prices.

Q. Are prices higher here in your experience during the show than they at other seasons of the year?

A. Usually a dollar a hundred or a dollar and a half.

The witness further testified that because livestock in large numbers were held back for the show, it had a tendency to prevent a glutted market in the fall marketing season. The witness further testified (R 795):

Q. Now, does a person in the country who doesn't come to the Show in your estimation get any of the educational benefits, and if so, how?

A. Well, you know the neighbors that come, they go back home and tell them what they have seen at the Show and of course a man that stays home, he never sees no cattle but his own, and he naturally gets to thinking that they are the best there is, and

if he takes a trip, say, to the Denver Stock Show and sees the cattle up here, he is liable to go back home and say, "Our cattle aren't near good enough, we have got to do something to improve our cattle. We thought they were good, but they were not nearly as good as I saw at the Show." That is the general talk of visitors when they go back home.

Q. And also isn't it true that he perhaps sees a neighbor's cattle that have been improved by that neighbor's observations of the Show and he immediately starts in?

A. That is where it does the good.

Witness Mitchell, a large producer raising about 5,000 lambs a year, feeding about 25,000 to 30,000 lambs yearly and either producing or feeding or both, from 1,000 to 1,500 head of cattle per year, testified (R 800) that he has been familiar with the Denver show for sixteen years and further testified as follows:

Q. Will you state whether or not in your opinion the Denver Livestock Show sometimes called the National Western Livestock Show, is and has been a benefit to the livestock industry as a whole?

A. Well, I think it has been the biggest benefit, the biggest advertisement for the western cattle of anything that could happen in this western country.

Q. Well, do you feel that that benefit is limited solely to those who exhibit or attend or patronize the show or does that spread out through the industry as a whole?

A. I think it covers the industry in the western states here.

Q. I mean simply during the show week?

A. Well, it has a tendency to draw people to this country to buy up cattle other than show week.

Q. And has that tendency actually resulted in that increase in the buyer outlet, so to speak?

A. Well, it sure has, yes sir.

Q. As a matter of fact from your own experience do you or do you not have customers now who buy from you direct, contact with whom you first made at the Denver show?

A. Yes sir, we ship cattle to Indiana and we also ship cattle to Ohio and Missouri to people who came here to the Stock Show that we got in contact with.

Q. And do you feel that is fairly general, you are not just one, the only one who has ever had it?

A. Well, I think it is very general, I think it is very general among the traders and producers.

Q. And is it your opinion that it has brought into prominence what we call the Rocky Mountain type of blocky animal?

A. Yes sir, it has.

Q. It has made and created or helped to create a demand for that type, has it not?

A. It sure has, yes sir.

Q. At all times of the year?

A. Yes sir, at all times.

Q. Do you think the show has had any effect upon the prices, we will say, for which livestock moves?

A. Well, I think you take Stock Show week, I think these cattle would bring anywhere from 75 cents a hundred to $2.00 a hundred more than they would the ordinary week before or three weeks before or possibly three weeks afterward.

Q. And the producer receives that additional price, or the feeder?

A. He sure does, yes sir.

Witness Jamison in his testimony stated that it was generally conceded that Denver was the largest market for bulls in the United States, and witness Mitchell corroborated this (R 801), stating that

". . . . it is known all through the southwestern and northern cattle country that it (Denver) is the best place to buy bulls in the United States during the Stock Show week because they assemble more good bred bulls at that time and people can come here and see maybe a thousand or 1,500 of them in two or three hours if they wanted to look at that many and if you had to drive over the country it would take 30 days to get what he really wanted."

He testified to the importance of well bred bulls by pointing to the fact that the Government regulation did not permit any one turning a bull loose on the range or on the forest reserve unless he is a registered bull "and a good individual with it."

Witness Farr, a feeder and fattener of about 35,000 lambs and 1,000 head of cattle per year testified (R 940) that he had been familiar with the Denver show since 1907; that being in the business of feeding as distinguished from producing livestock, he gets out in the territory to watch the livestock and to buy feeders sometimes direct and has therefore had opportunity to observe the effect of the stock show on the industry. He stated that in his opinion the livestock show at Denver is a benefit to the industry as a whole. A portion of his testimony is as follows: (R 940).

A. I think any show is one of the greatest advertisements there is for meat and meat products. It is very educational for people to go there and see the different classes of stock and how they have been bred and improved. I think it is, you might say, it is the top degree for agricultural college or high school students, 4-H Club boys and girls, their aspirations to get to go to some show, Denver or Kansas City, and so forth. The stock judging teams that they send all compete at these shows from the various States and counties and so forth.

Q. Well, do you feel that that benefit spreads out through the industry and touches those who do not even attend the show?

A. Yes, sir.

Q. From your contacts with the industry as a whole, do you know whether or not those who have not attended gain valuable lessons from their contact with those who have attended the show?

A. I have seen that in my own community where probably the parents would never go to the show and their children got interested through 4-H Club boys and girls and exhibited their animals at the show and come back and their parents got pepped up and they soon start to breed better sheep and cattle and hogs from the effects of the show.

Q. In your opinion has the Denver show created an enlarged outlet for livestock which operates beneficially throughout the year?

A. Yes, sir.

Witness Pexton, Vice President and Assistant General Manager of appellant, testified from the background of many years close contact with the Denver market. He outlined briefly the history of the show (R 829) and stated that the show had its inception in an insistent demand from the producers that the general quality of livestock in this territory should first be improved and then should have the advertising of a show to increase its outlet. He described the facilities devoted to the show, agreed with the Government witness that the facilities are not excessive; and stated that the show had three main purposes, namely:

". . . The first is to show producers the kind of livestock that can be produced by better breeding and higher quality animals; also, the results that may be obtained on the same amount of feed and time with such animals, compared with the kind formerly produced. Second, to exhibit and have on hand, for purchase if desired, these higher type breeding animals; and third, to advertise, create a premium upon, and provide an outlet for these better type animals after they are produced." (R 832).

He testified positively and gave examples demonstrating that all three of these purposes have been and are being accomplished by the show. He pointed out that it costs just as much to raise and market a poor animal as it does a good animal and that the producer receives a greater net return from a good animal than he can possibly receive from a low grade animal.

Respondent's Exhibit 2 is an article by the Chief of the Bureau of Animal Industry, United States Department of Agriculture, and a portion of that article was read into the record (R 432) from which the following brief quotation is taken:

> "In the industrial world a firm which expects to prosper and produce dividends does not use obsolete methods and equipment. Junking old machinery and remodeling old factories takes both courage and capital. But in the end such a course is the wisest and most economical.
>
> "How is the livestock industry meeting the same situation? . . . There is evident need also for a closer relation between our standards for breeding stock and the utility value of the product. If, as now appears to be the case, quality in meat is an inherited character, we may wisely develop, within the breeds, strains of cattle, sheep and swine that will produce meat of assured quality. In any case the industry may wisely cull out, at once, the types that are plainly unfit in the light of present breeding and market standards.
>
> "Naturally we look to the great stock shows as the supreme authority on animal conformation. Hence every means of stimulating entries by the best breeders adds to the value of such shows. And, conversely, any condition that discourages the most able breeders from showing their animals tends to place leadership in less worthy hands. . . ."

The National Western Stock Show, as the show is called, is rated as one of the three largest livestock shows

in the industry (R 831). In some respects it is the largest. As a part of the show and in the yard proper of appellant, there is annually held the largest market for breeding bulls in the United States (R 801 and 833) and the largest auction of feeder cattle in the United States (R 796, 801, 834, 843). The show brings buyers in large numbers to Denver from all over the United States and the distribution is wide spread (R 431, 686). Many of those buyers become permanent buyers (R 800). The show has created a market for Western feeder cattle at all times of the year (R 834).

We submit that the record utterly fails to support the finding that the show is only an indirect benefit either to the industry as a whole or to that part of it which markets at Denver. The fact that it is a powerful advertising medium is not denied by the government.

It is not denied that these structures are leased to the National Western Stock Show Association for the one week period of the show and then "when, as and if" earned, the company receives $7,000. therefor. At the date of the hearing, the average received for the ten preceding years, was $3,547.50 (R 839). A more accurate statement would be that these structures, together with most of appellant's other property, is devoted to stock show use during this one week and appellant takes into its treasury $7,000. or so much thereof as has been earned by the show. The feeder cattle are yarded in the main stockyard up to Alley 22 or 23,[23] with fat cattle in the pens nearest the Exchange Building. The pure-bred bulls are in the pens in the triangle south of the Exchange Building. Carload sheep are exhibited in the sheep barn in the yards, carload hogs in the regular hog barns. Boys and Girls Club livestock (4-H Clubs) with registered pure-bred cattle, calves, sheep, hogs and horses, are exhibited in the structures in controversy (R 967). In short, the excluded properties are only a part of the properties devoted for one week each year to the Stock Show. The bulk of appellant's yard is so used.

Note 23—Alley 22 is approximately the center of the cattle division shown in photograph in the envelope at the end of this brief.

The finding of the trial court that the appellant "does not carry on any of its business in these buildings" is contrary to fact. Its business is the livestock business and the development of better livestock, and a better market. Whatever is in furtherance of these ends is its business in the truest sense of the word. The close relationship between the Association and the appellant is admitted by the Government. This is emphasized by the fact that the Association is a corporation not for profit—organized as an educational or public welfare association under the business and administrative control of appellant (R 842).

The fact that there is an ostensible lease or an actual lease does not exclude the property from the rate-base. All income received goes to decrease operating expenses, and if, as the record abundantly proves, the Stock Show benefits all patrons of the market, the appellant and the industry as a whole, this income *pro tanto* lessens the total cost of the service to the industry. This principle was recognized by Mr. Christensen who was called by the government to testify, among other things, as to the property exclusions (R 403, 410). It was recognized in *Brooklyn Gas Co. v. Prendergast*, 16 Fed. (2d) 615 at 627.[24] The California Railroad Commission recognized the principle in *Re Southern California Edison Co.*, P.U.R. 1924 C 1 at 12 by including in the Electric Company's rate-base, a railroad property operated by a separate subsidiary corporation but not operated solely in the electrical business, the income from which subsidiary went into the operating revenues of the Edison Company.

The argument by the Secretary that if the Stock Show be held to be a stockyard facility, it would cast upon the Secretary the duty and responsibility to determine the reasonableness of general entrance fees, reserved seat prices, the charges made concessionaires, etc. is without merit (R 267). These are incidental items. The Interstate Commerce Commission does not attempt to regulate the

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Note 24—". . . that tenants occupy the upper floors of parcel No. 7 is no reason for disallowing that property in the rate-base. The rents collected are used to reduce operating expenses." (Opinion p. 627).

prices of or the charges to "news butchers" on the trains, or the rental of news stands in stations, or cab stands, or office space in terminals, etc. The Secretary of Agriculture in this case has included the value of the Exchange Building but has not assumed the responsibility of determining the reasonableness of the rentals charged to commission men, yard traders, serum companies, telegraph companies, the news, soda and cigar stand, or to the Government for the post office. The argument is fallacious.

Equally fallacious and wholly unsupported by the evidence is the conclusion of the Secretary (R 267) that because appellant "underwrites" all deficits, to include the Stock Show properties would be "to pass on to the public in rates an amount which in justice it ought not to pay". Respondent's Exhibit 14 (R 839) shows that during the ten-year period, 1925 to 1934, appellant received an annual average of $3,547.50. The earnings in the yards proper due directly to the Stock Show are shown by the record to be not less than $11,592.00 (R 836 and Respondent's Exhibits 13 and J).

Properly viewed, there has been no deficit. But even if there were, the testimony is that it is fair, reasonable and just for all livestock producers, including those who do not attend the Show, to pay their part of the costs thereof through rates because of the benefits received as members of the industry. Two producer witnesses, Mr. Mitchell and Mr. Farr, were questioned directly on this point by government counsel and they so testified (R 804 and 944). There is no contrary testimony.

The fact that appellant's Board of Directors for approximately 38 years have been carrying on this Show in the belief that it was mutually beneficial to the company and the industry, is entitled to some weight.[25] In spite of the fact that the stockyard business is charged with a public interest, it is still a private business and the power to regulate does not give the right to manage.[26]

Note 25—*West Ohio Gas Co. v. P. U. C.* 294 U. S. 63 at 72.
Note 26—Southwestern Bell Telephone Co. v. Pub. Serv. Comm., 262 U. S. 276 at 288. See also, United Railways v. West, 280 U. S. 234 at 249.

In the decision of the 1930 rate investigation between these parties, the Court in making the injunction permanent, said (57 Fed. 2nd 735 at 750):

"The petitioner owns and maintains land and buildings for the purpose of an annual live stock show, the show being operated by the National Western Stock Show Association, a separate corporation; the expenses of the show are borne by public subscriptions, but the stockyards company pays the taxes on the properties. . . .

Here again the evidence is undisputed. The Department of Agriculture is expending considerable sums of money in an effort to induce cattlemen to raise a better grade of cattle. A pickup calf, or a grade steer, will eat as much as a pure bred, but it will not bring as much on the market. The primary object of livestock shows is to convince the cattle raiser of the wisdom of raising the better grade stock.

The business of the petitioner is entirely dependent upon the live stock business in its territory. If that business perishes, the petitioner will perish. If that business flourishes, the petitioner will flourish. It is axiomatic that the lives stock business will not flourish unless it is profitable. It will not he profiitable unless better live stock are raised. In bending its efforts toward furthering the success of the live stock business in its territory, the petitioner is furthering its own business. Here, again, to deny the petitioner the right to earn a return upon these properties, is to deny it the right to bear a part of the expense of this stock show. Furthermore, the stock show attracts buyers, and, the more buyers that are bidding, the better the prices that are obtainable. . . .

That the directors have maintained the show, in good faith and in the belief that it stimulates the market presently, and insures a more stable and better business for the future, is not questioned. The facts are not in dispute; the question is one of law. We are

of the opinion that the petitioner has a right, in the conduct of its business, to own these properties for this purpose, and that it is not within the power of the Secretary to deny the petitioner the right to stimulate its business and to insure its future stability by denying to it a return upon properties used for that purpose. . . ."

In *St. Joseph Stock Yards Company vs. United States*, 298 U.S. 38 at 56, 57, the question was presented as to the exclusion from the rate base of the value of a certain hotel known as The Transit House, owned by the Yard Company. The value of this hotel and and land had been excluded as not used and useful property on the ground that it was maintained on a non-compensatory basis for the special benefit of truck drivers and others who patronized it, and that it was not clearly shown that the business of the yards would be materially affected by its absence. This Court stated that it took the same view of the evidence. The converse of this proposition is that if the hotel had been of general benefit to the industry and its absence would have materially affected the business of the yards, its value would necessarily have been included in the rate base.

That we submit is the situation with regard to the stock show properties at Denver. That these properties and the livestock show held therein is of direct, definite and general benefit to the industry is established by the record as we have above demonstrated. The record also establishes that the business of appellant would be materially affected if the livestock show were not held. Every producer witness as well as officials of the company testified, for example, that the feeder auction at which between 500 and 700 carloads of feeder cattle, or from 20,000 to 30,000 head are received and sold during a two-day session, could not be held at any other time than during stock show weeks because the buyers from all over the country would not be present; that annually the largest market on breeding bulls is held in the Denver yards during stock show week; that sheep and hogs are shipped in during show week in great numbers, and sales in

large volume occur. That the livestock which comes to the Denver market during show week is not all pure bred stock but grade stuff is testified to by Government witness Christensen (R 429). It is further established that if it were not for the increased business due to the show, the month of January, under conditions which exist in the range country tributary to Denver, would be lighter in point of receipts and sales than the December preceding or the February following, instead of which the average January earnings during the six-year period preceding the date of the hearing are $11,592 greater than the average of the preceding and following months. Citations of the testimony and exhibits establishing the fact of this increased business are given in the portion of the brief immediately following and are not repeated here.

Appellant furthermore introduced evidence that if all of the income which is properly allocable to the stock show, were taken into account and recognized by the Secretary, it could not be said that the show is maintained on a non-compensatory basis (R 838). It is the failure by the Secretary as pointed out in the following portion of this brief, to recognize that the increased earnings of the yard are derived from and on account of this livestock show, that makes it appear that it is so maintained. As stated in the St. Joseph decision, however, if the general benefit to the industry and its business producing effect be proven, it makes no difference whether it is compensatory or non-compensatory, the value of the property must be included in the rate base in either case. We submit that these necessary facts are established of record in the case at bar and that it is error to exclude the value of this property.

The finding that the Stock Show is not a stockyard service (R 268 and 1252) is contrary to law. Sec. 201 (b) of the Packers & Stockyards Act, 1921,[27] defines stockyard services to be services or facilities furnished at a stockyard in connection with the marketing, feeding or handling in commerce of livestock. It is not denied that large quantities of pure bred livestock are exhibited in the stadium, fed in the

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Note 27—Appendix p. 102.

tile barn and the other adjoining barns and sold in the sales pavilion. It is not denied that large numbers of bulls, fat and feeder cattle and calves, fat and feeder sheep and hogs are exhibited in the pen area, sheep and hog barns in the yard proper, and sold there or at the feeder auction. We submit that the Secretary has no authority to exclude these properties. As in the O'Fallon case,[28] the instant case is concerned with the command of Congress addressed to a regulatory agency in relation to its valuation of the property of the regulated utility. We insist that that command has not been obeyed.

B. *In any event, the action of the Secretary is arbitrary and confiscatory in that, if the Stock Show properties be excluded, he has failed to exclude income derived directly from the Stock Show. It follows that the decree of the trial court in sustaining the Secretary's Findings is likewise erroneous.*

In excluding the value of the Stock Show properties from the rate-base, the Secretary excluded from appellant's income account, the average rent received, and from the expense account, the average taxes paid on those properties.[29] The record establishes that this was not and is not all the income derived from or on account of the Stock Show.

Denver is a range market. Unlike the Missouri River markets, it derives its main livestock supply from the ranges and ranches of the mountain and plains country rather than from feeders and feed lots in the corn belt section around the Missouri River markets. The livestock is driven out of the forest ranges and high mountain pastures by climatic conditions. Sheep come first, both because they are a less hardy animal and because they summer in the high pastures, many of which are above timberline or in Idaho, Montana and Wyoming where winter snows are apt to come earlier than in the more southerly states. The sheep run starts generally in late August or early September, reaching

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Note 28—*St. Louis & O'Fallon RR. v. U. S.* 279 U. S. 461. See distinction drawn in RR. Comm. v. Pacific Gas & Elec. Co. ..... U. S. ....., 58 Sup. Ct. Rep. 334, advance sheets.

Note 29—Appendix pp. 115-117.

its peak in October, tapering off in November. The cattle run starts about the middle of September, reaches its peak in late October and November, tapering off in December (R 423, 809, and 950). Sheep from the feed lots of Northern Colorado do not return until late February and then continue through March and April.

The proof of income directly due to the Show consisted in establishing that livestock is held back for the Show; that due to the seasonal conditions, the month of January would be a period of light receipts and light earnings, comparable to December and February but for the influx of livestock and the sales caused by the Show, a comparison of earnings in the comparable months, and the opinion of men in active touch with the market that a large percentage of the livestock shipped to Denver for the Show would not come at any other time.

These facts were definitely established in the record.

Witness Mitchell, a large producer, testified as follows: (R 800)

> "Yes, to my knowledge livestock is held off the market for the Show. I hold my stock off year after year waiting for the Stock Show week to come. I think that if it were not for the Stock Show week in Denver, there would be times that your market would be just kind of glutted with cattle and would have more cattle than it could handle. The effect of a glutted market is that the producer would try to find some different market to put his cattle in. No, I do not think that the cattle would come to Denver at other times of the year if you did not have a Show. There would be a certain percentage of them that would come and I think there would be quite a few cattle that would not come here that would go to other markets. . . .
>
> Yes, I am familiar with the feeder auction at Denver. It is the largest auction in the United States by far, I guess. Stock Show week is the most probable time for an eastern man to buy his cattle that he is go-

ing to put to graze in the Spring. He buys a few carloads to finish out on corn and blue grass. Yes, the Stock Show brings the buyers to Denver, and unless there was a concentration of buyers, I do not think that such an auction could be held. In other words, I figure you have got to have the buyers or you couldn't have that kind of an auction, and the buyers have to come from a lot of States to take the cattle in as big runs as they have there at Stock Show week. I don't think the buyers would come here in numbers like they do at Stock Show week unless it was for the Stock Show."

This same witness also described the range movement of mountain grass fed cattle which he said ends in the latter part of November or the first part of December, and testified (R 802):

"If it were not for the show, receipts for January would be very much lighter than they would be in December."

Witness Jamison, also testified to the same effect (R 794) stating that the feeder auction at which very large numbers of feeders are sold, could not be held at any other time than at the Stock Show (R 796) and that there was no reason why the receipts and sales in January should exceed December and February, except the Show.

Witness Farr, a large feeder of both sheep and cattle and one who has been familiar with the Denver market for thirty years, during the last ten years of which he has been a director of the Company, testified as follows: (R 941)

"In my opinion the Denver Show creates an enlarged outlet for livestock which operate beneficially throughout the year. In my opinion a part of the income at the yards is directly traceable to the Show. If they didn't have the Stock Show their income would be very low in January. That is true on account of the immense amount of livestock that the Show draws, especially the large amount of feeder cattle. . . . In January the range run is over and there would be practically no business here if it wasn't for the Show. In

other words, January would, in my opinion, be a greatly lower month than December so far as cattle or sheep are concerned.

"In my opinion, the feeder auction could not be held at any time other than at the Denver Stock Show period."

Witness Pexton, Assistant General Manager of petitioner, testified (R 837) that the livestock marketed at Denver during the show would not come at other times, and gave cogent reasons for that opinion. He further testified (R 969) that from 100 to 125 carloads of cattle compete for prizes at the show and between 20,000 to 30,000 head or from 500 to 700 carloads of feeder cattle are received for sale during show week. It is admitted that these are yarded in the cattle division of the yards proper up to alley 22. The record also shows that the Denver show has as many as 1500 purebred bulls (R 801), all of which are housed in the yards proper (R 1037). These buy and consume a large amount of feed and pay a marketing charge of $1.00 per head when sold, all of which goes into general revenues of the company and is included by the Secretary in his computations. These bulls would not be shipped to Denver in quantity at any other time of the year because buyers of breeding stock would not be present in sufficiently large numbers to warrant such shipments at any other time (R 801, 1037). Carload sheep and carload hogs are sent in for the show, cared for and sold in the yards proper, that is to say, in the sheep and hog barns, with less than carload lots housed on the "hill," as the show properties are called, but nevertheless these shipments are attracted to Denver by reason of the show and sold because of the show.

Mr. Pexton also introduced in evidence, Respondent's Exhibit 13, which compares the average earnings during the months of December and February preceding and following the show, with the month of January, during which the show was held, for each of the years of the six-year period, 1930-1935 inclusive. The earnings shown in each instance were and are the net earnings for the periods in question after deduction of general overhead, taxes, bond interest, labor

costs and all other expenses, following, for purposes of argument, the theory of the Government auditor in the adjustment of income for rate-making purposes with which theory we do not agree. That exhibit showed that the average earnings of January during that period were greater than the average of December and February for the same period by $11,592.14 per year.

In conformity with a stipulation of the parties, the comparison of earnings for December 1935 and February 1936 with January 1936, and December 1936 and February 1937 with January 1937, were also made part of the record (Resp. Exs. J and R). These showed an excess in January in the years in question of $17,071.88 and $14,241.72 respectively.

There is no contrary testimony. The Secretary exercises his so-called discretion and determines that the livestock would have come to the Denver market at some other time. This is mere prophesy of the sort condemned by the Court in *West Ohio Gas Co. v. Public Utilities Comm.* (2nd case) 294 U.S. 79. It is not only contrary to the evidence above set forth but finds no support in the evidence. We submit that the regulatory agency in a rate hearing cannot supply a lack of evidence by reliance upon its or his "judgment." As stated in *West Ohio Gas Co. v. P. U. C.*, 294 U. S. 63—"A hearing is not judicial, at least in any adequate sense, unless the evidence can be known."

This question of the failure of the Secretary to exclude the income if he excludes the property, strikes deeper than the mere question of the finding being arbitrary. It strikes at the jurisdiction of the Secretary to modify the existing rates of appellant. The Packers and Stockyards Act, 1921, from which alone the Secretary derives any authority over appellant's rates, permits the Secretary to change existing rates only when found unreasonable.[30] He assertedly so finds but without excluding this income. The finding of the Secretary (R 345) is silent as to the unreasonable excess, if any. If that excess, if any, were equal to or less than this non-excluded income, the Secretary is without jurisdiction

Note 30—Secs. 210 (c) and 211, U.S.C.A. Title 7 Chapter 9.

to change appellant's rates. It is immaterial for this point whether the income be left in and the value of the property added to the rate base, or the value of this property omitted and the income likewise excluded. The result is the same but the Secretary must choose either the one or the other route. He chose to exclude the value of the property and under those circumstances, the above jurisdictional finding is not sufficient.

Our major proposition upon which we rely is that the Stock Show property is a stockyard facility and as such the value thereof must be included in the rate-base. The findings of the Secretary and of the trial Court are unsupported by the evidence. In the alternative, however, if the property be excluded, then the income derived therefrom must also be excluded. This the Secretary has not done and his error was continued by the findings and conclusions of the trial court. We submit that they cannot stand. The declarations by the Secretary that the Stock Show is not a stockyard facility, or is only an indirect benefit to the industry, or that existing rates are unreasonable, are not above the scrutiny of this Court.

We are mindful of the following pertinent language from the opinion of the Court in the *St. Joseph Stockyards* case 298 U.S. 38 at 52:

> "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded."

III.

Trackage, Loading & Unloading Docks, Chutes, Chute Pens & Alleys.

THE COURT AND THE SECRETARY ERRED IN EXCLUDING FROM THE RATE BASE OF APPELLANT THE VALUE OF THE RAILROAD TRACKAGE, LOADING AND UNLOADING DOCKS, CHUTES, AND CHUTE PENS, TOGETHER WITH THE VALUE OF THE LAND WHEREON THOSE FACILITIES ARE SITUATE AND EXCLUDING ONE-HALF THE VALUE OF THE ADJACENT ALLEYS. THE FINDINGS UNDER WHICH THESE PROPERTIES ARE EXCLUDED ARE CONTRARY TO LAW, UNSUPPORTED BY THE EVIDENCE AND ARBITRARY.

The property thus excluded is		
Value of land (Governmental appraisal)[31]		$ 54,332
Structures		
Chutes, including docks and pens	$ 93,788	
Trackage, including tool house & office	58,644	
Total structures, Reproduction new	152,432[32]	
Government condition percent	80.545[33]	
Total, reproduction new less depreciation		$122,776
Total value excluded from Rate base		$177,108

In the land excluded is one-half the area of the adjacent alley (R 245) to give ingress and egress into and out of the holding pens.

The Secretary's findings on this point are contained in paragraphs 40 to 42 inclusive of his order (R 245). Briefly summarized, they are that the railroads do not unload and load the livestock handled by them but employ the company

Note 31—See Record pp. 277-287, 289-90, and 297.
Note 32—Record p. 301
Note 33—Record p. 304.

to do it at $1.00 per car; that the Interstate Commerce Commission and this Court has held that this is a transportation service, and if so it is not a stockyard service since the Packers and Stockyards Act, 1921, does not confer concurrent jurisdiction on the Secretary of Agriculture over transportation matters. The Secretary then finds that there would be a double exaction if the loading and unloading facilities were to be included in the rate base since he asserts the service is a railroad service included in the railroad rate. Likewise with regard to the trackage itself, the Secretary argues that "if transportation does not cease until livestock shipped by rail is unloaded into suitable pens . . . transportation has not ended when livestock is being brought to those facilities over tracks owned by railroad companies or leased by them."

The finding of the trial Court is as follows:

> "8.985 acres of the land excluded by the order as being not used and useful are occupied by railroad trackage, alley ways, loading and unloading docks, loading and unloading chutes and pens, and yardmaster's office, and a trackman's tool house. These facilities are owned by petitioner, but are leased to the railroads serving the stockyards under an agreement whereby the railroads pay the plaintiff for the use of the property, cost of maintenance, repairs of tracks and taxes and assessments. In addition, the railroads pay petitioner on a per car basis for performing loading and unloading services. The amounts so paid are absorbed by the railroads or are included in the freight rates. The locomotives, transportation equipment, etc. essential to the use of this property are furnished and operated by the several railroads. The loading and unloading docks, chutes and pens which are leased by the railroads from petitioner are used exclusively for handling livestock in the course of transportation to and from petitioner's stockyards. This property and the structures thereon are not used and useful in the rendition of stockyard services."

The assignments of error upon which appellant relies are assignments numbers 2, 3 and 4, and briefly summarized are that these findings are contrary to law, unsupported by the evidence and confiscatory in that (1st) these facilities, wholly owned by appellant, are stockyard facilities within the definition of Section 201 (b) of the Packers & Stockyards Act, 1921[34]; (2nd) the loading and unloading docks, chutes and pens are not leased to the railroads and that there is no evidence thereof in the record; and (3rd) that the charges paid the company on the per car basis are not absorbed by the railroads and included in the freight rates in the majority of the cases and that there is no evidence of record to support this statement and finding of the court.

A. The trackage—It is admitted that all of the three and one-third miles of trackage is owned by appellant and is on land of appellant within the stockyards area (R 405, 884). All of this trackage is industry track or spur track, connecting with the carrier owned trackage outside the yard area, as a reference to the photograph in the envelope on the back cover of the brief will show. It is likewise admitted that all of that trackage is necessary in connection with the handling of livestock in commerce. (Government Ex. 5, page 6, Class A Property; see also (R 401, 403).

The government position is based on its interpretation of section 15, subparagraph (5) of the Transportation Act and Sec. 406 of the Packers & Stockyards Act, 1921[35], (U.S.C.A. Tit. 7 Sec. 226). The latter section provides that nothing in the Act should be construed to affect the jurisdiction of the Interstate Commerce Commission or confer concurrent jurisdiction on the Secretary. Section 15 (5) of the Interstate Commerce Act provides:

> "Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public

Note 34—Appendix p. 102.
Note 35—Appendix p. 106.

stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefore to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The commission may prescribe or approve just and reasonable rules governing each of such expected services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers existing on February 28, 1920, by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to sipments other than those to or from public stockyards (Feb. 28, 1920, c. 91, sec. 418, 41 Stat. 484; U.S.C.A., Sec. 15 (5)."

There is nothing in this section which deals with title or makes a stockyard facility any less of a stockyard facility merely because a carrier uses it. Properly interpreted all this section means is that the carrier must furnish loading and unloading service at its own expense at terminal markets when such terminal market is either a "feed in transit" point or the final destination of the shipment. The carrier must provide these facilities by either owning or leasing them, but if the carrier elects to lease rather than make the capital outlay to buy or build, there is nothing in this section of the Interstate Commerce Act which changes the character of the facility or which *prohibits a stockyard company from owning, furnishing, or including the value thereof in its rate base.* The sound interpretation was made by the majority opinion in the 1930 rate hearing—*Denver Union Stock Yard Co. v. United States,* 57 Fed. (2nd) 735 at 749.[36]

Note 36—"The respondents freely concede that properly located side tracks are indispensable to the operation of petitioner's business; no claim is made that, when these tracks were constructed or now, the railroads could have been required to construct them at their own expense. The sole reliance of the respondents is upon section 15 (5) of the Interstate Commerce Act (49 USCA), and the decisions applying it, which provide that railroad transportation ends only after the live stock is unloaded. Covington Stock-Yards Co. v. Keith, 139 U. S.

No one contends that the railroads could be required to build these tracks within the stockyard area. Schlicher *v. Director General*, 62 I.C.C. 181 at 187; *Winters Metallic Paint Co. v. Chicago M. & S, P. Ry. Co.* 16 I.C.C. 587 at 589. But when the industry, as here, has constructed those tracks, it can compel the carrier to grant switching service. *Interstate Commerce Act* Sec. 1 (9). This, however, does not destroy the nature of those tracks as a facility of the industry.

As a practical matter, with the volume of traffic produced by appellant's market, there is no doubt but that any railroad would fight for the chance to build these spur tracks to control the traffic even though appellent could not require it so to do, but this is exactly what appellant does not want and cannot afford to have happen (R 884, 885, 1175). Appellant must be able to require joint use of tracks and yet must be free to move the tracks to different locations as the growth of its market demands (R 408).

The Secretary allowed in the rate base the value of all roadways and the trial court approved this. Government witness Christensen (R 408) stated the truism that there

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128, 11 S. Ct. 461, 35 L. Ed. 73. Respondents' brief states the position of the Secretary as follows: 'If the railroad leases property of a stockyards in order to gain access to pens, the transportation service nevertheless ends at the place where the livestock is loaded and unloaded. In other words, it is not the ownership of the land over which the spur track is constructed, or the legal obligation or absence of it to construct a spur track that determines whether such track is employed in stockyards or transportation service. It is rather the nature of the use.'

"There can be no doubt but that this trackage is used by the railroads in the discharge of their public duties. There is likewise no doubt that petitioner owns it, and has a right to own it, as a part of its stockyards facilities. The respondents assume that the same property cannot be used for two purposes—that of transportation and market. We cannot agree with this assumption; the fact is that the proper location of side tracks is a part of the services of marketing. The trackage here is indispensable both to the transportation and the marketing of live stock. It is in fact used and useful for both services. Since it is undisputed that the petitioner rightfully acquired this trackage, in order better to discharge its responsibilities to its patrons, and that such trackage is in actual use, it seems unfair to deny it a return thereon because perforce it must be leased. To relegate it to such return as it may be able to secure by an agreement with its lessee is to deny its right to a fair return. Such return as it does get should be restored to its income account."

is no difference between a highway of steel rails and a paved highway, so far as the handling of livestock in commerce is concernced except the physical makeup of the two "highways" by reason of which a different mode of transportation is required.

It is to be noted that appellant does not own and never has owned any locomotives or rolling stock of any kind. It is not a common carrier and has never held itself out as such. In this lies the distinction between the instant case and *Atchison, Topeka & Santa Fe Ry Co. v. United States,* 295 U.S. 193 and *Livestock Loaded & Unloaded at Chicago,* 213 I.C.C. 330. In the latter case the Commission said (Italics ours):

> "The Supreme Court, in holding respondent to be a common carrier, referred not alone to *its affiliation with the lessee of its railroad* and to the fact that the services and facilities furnished by it were 'transportation,' but also, emphasized, as above shown, that respondent and the Junction were 'common carriers because they are made such by the terms of their charters, *hold themselves out as such and constantly act in that capacity, and because they are so treated by the great railroad systems which use them.* Although respondent's pecuniary interest in its railroad is now in the form of a fixed annual rental, it is very substantial. In the contemplation of its charter it is still engaged in the 'public callings' of operating public stockyards and a railroad as an adjunct thereto."

This is an entirely different situation from that which exists in the case at bar.

The Secretary excluded from income and expense accounts of appellant all income and expense received or incurred in connection with the trackage. This is proper if the facility is to be excluded. As a matter of fact, the question is somewhat academic because that income is sufficient to return a fair rate upon the investment. It is to be noted that we do not in this instance allege that the action of the Secretary is confiscatory. We believe the trackage

is a stockyard facility and hence its exclusion from the rate base in contrary to law. We are dealing with a Congressional mandate as to valuation.[37]

B. The loading and unloading docks, chutes and Pens. The Secretary did not attempt to exclude these facilities in the 1930 rate case. This extended use of the pruning knife has been reserved for this hearing. So far as we have been able to ascertain the Secretary did not exclude such property in the St. Joseph case [38] or in the valuation of any other stock yard.

The same position is taken by the Secretary , namely that these are transportation facilities and not stockyard facilities due to Section 15 (5) *supra* of the Interstate Commerce Act and hence their value is not to be included in the rate base of appellant.

The docks are long platforms with inclined runways or chutes leading down therefrom into pens. The platform is at the approximate height of a car floor. One dock parallels the Burlington spur track on the east side of the yard; another parallels the Union Pacific tracks on the westerly side of the yard, the C. & S. or quarantine dock is adjacent to the sheep and hog barns and the River dock is back of the sheep barn and adjoining the river tracks. All are owned by appellant.

The Court in its Finding No. 8 makes the erroneous finding that "the loading and unloading docks, chutes and pens are leased by the railroads from petitioner." This is contrary to fact and no evidence thereof is to be found anywhere in the record. This, we believe, will be admitted by Government counsel.

These docks and chutes are used in the loading and unloading of livestock received by rail, which, we submit is part of the "handling" of livestock in commerce. Exactly similar docks, chutes and pens are constructed and in use for the loading and unloading of trucked livestock, no part

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Note 37—c.f. St. Louis & O'Fallon R.R. v. U. S. *supra* see Note 28 *ante*.
Note 38—c.f. St. Joseph Stock Yards Co. v. United States, 298 U. S. 38 at 56.

of which are excluded by the secretary. That the docks and chutes in question are located in the appellant's stockyard, and were built by it on ground owned by it within the stockyard area cannot be seriously denied. We cannot believe the trial court was serious in its attempted distinction[39]. Section 202 of the Act does not lend itself to any such strained construction, particularly when read in connection with the definition of stockyard services and facilities contained in Section 201 (b) of that Act. (Appendix p. 102). Furthermore, the docks and chutes are certainly "appurtenances" of the adjacent pens.

It must be remembered that a place is not a "stockyard" within the meaning of the Act unless it is operated for profit *as a public market.* (Sec. 202 (a) of the Packers and Stockyards Act, 1921, U.S.C.A. Title 7). We submit that these pens, chutes and docks are much a part of the market equipment as the other pens in the cattle, hog or sheep divisions, all of which without exception were allowed by the Secretary and the Court. There is no contrary evidence. On the contrary, the evidence is that the use of these holding pens is not limited to loading and unloading operations (R 1177) but that these pens are in frequent general use during peak seasons.

There is no merit in the contention that to include the value of the property in the rate base and allow a return thereon would result in a double exaction from the shipping public. This could only be true if in such case the income derived from the carriers were not included in appellants income. Where the income is included, it operates to reduce *pro tanto* the balance to be spread into rates. For example, suppose with the property included in the rate-base, a fair return would be $200,000. Suppose a net income of $20,000 from the carriers for use of the trackage and for loading and unloading services. If this

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Note 39—R 1267, where the Court says: " . . . nor does any part of the transportation to and from the plaintiff's plant come within the definition of a 'stockyard,' which is a public market:
" 'consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses; mules or goats are received, held, or kept for sale or *shipment* in commerce'. 202, Title 7, U.S.C.A."

net income be included in the income for rate-making purposes, as it must be if the property be included in the rate-base, then there is a balance of $180,000 remaining to be spread into rates. There is no double exaction.

Furthermore the premise of the Secretary and of the trial court that the loading and unloading charges are included in the freight rate is contrary to fact and unsupported by the evidence of record. It may work out that way, or substantially that way, at some of the Missouri River markets and Chigaco where by reason of the predominance of fat livestock and a large percentage of slaughter, the particular stockyard is the final destination of the shipment. That is not the situation at appellant's market. At Denver only 20% of the livestock received by rail is slaughtered locally (R 1047). Denver is a transit market, and when transit is granted by the carriers, it falls within the exceptions contained in section 15 (5) of the Interstate Commerce Act. The unloading and loading in such case is deemed to be at the request of the shipper and hence the charges are not absorbed. The undisputed testimony of record, elicited by government counsel on cross-examination of Mr. Pexton, assistant general manager of appellant, is that the railroads pay about 20% and the shippers about 80% of the loading and unloading charges at Denver (R 1046). The findings of the Secretary and the Court, therefore, that these charges are included in the freight rate is contrary to fact.

C. The so-called chute alleys. The pens for the holding and care of livestock in a stockyard are arranged in blocks, each pen and each block of pens opening on a passage way or alley of sufficient size to permit the driving of livestock to the scales, or other pens or places in the yard and to permit access for feed wagons and cleaning trucks and to give ready access in case of fire. At the corners of each block of pens are two-way gates which can be so arranged as to shut off other alleys and make a "thorough highway" for the driving of the livestock from any part of the yard to any other part.

The main alleys, running lengthwise of the yard in the cattle division are wider than the normal cross-alley due to the fact that they are the main highways, so to speak, and carry more traffic.

The Secretary excluded from appellant's rate base the value of one-half the land and roadway improvements, i.e. grading, paving, draining and guttering, of those main alleys which border on the loading and unloading chutes, pens and docks. His finding in this matter is not clear but the fact of this exclusion will not be denied by the government. The purported area of the various docks, designated generally by the name of the railroad adjacent thereto, although entirely owned by appellant, is given in paragraph 42 of the Secretary's order (R 248) under the heading "Non-used and Non-useful" and the areas thus given include the area of the half of the alleys upon which these docks and pens front. The reason for this exclusion assigned by the Secretary is that this space is necessary for ingress and egrees to and from the loading and unloading facilities and that since the latter are transportation facilities to be excluded from the rate base on that ground, this alley space is also a transportation facility to be likewise excluded. The trial court in Finding No. 8 (R 1251) recognizes that alley ways are included in the 8.985 acres excluded as transportation facilities and makes a similar finding.

These findings are wholly unsupported by the evidence and extremely arbitrary. The record discloses the following:

(R 413) Government witness Christensen, the Field Assistant to the Chief of the Packers and Stockyards Division, Department of Agriculture, called as an expert to testify as to the used and useful or non-used and non-useful status of appellant's properties, testified that the chute alleys are not used solely for the purpose of ingress and egress to the loading facilities, but are used for other purposes, yet in his opinion ingress and egress, was the primary use. He admittel that the fence running down

the center of the wide alley dividing it in two parts is broken all along with gates and that the alley is used "in some instances" like a two-way road. This is the sum total of the government testimony on the subject.

Mr. Shoemaker, the president and general manager of appellant testified (R 1170):

> "I heard Mr. Christensen's testimony. He recommended the disallowance as a stockyards facility of certain alleys which he designates as chute alleys, on the grounds that they are transportation facilities used in connection with and almost exclusively for the unloading of livestock. *These chute alleys are so called because they are the alleys nearest the chutes.* There are four of them running lengthwise of the yards, one on each side of the cattle division and one on each side of the hog and sheep division. While naturally these alleys are used for the movement of livestock to and from the unloading chutes, *they are used, I would say, much more for miscellaneous operation of the stockyards.* For example, the truck-in livestock is moved to some of these chute alleys to reach sales pens. Likewise, hogs, sheep, and cattle use these alleys from the stockyards to the packing houses, both those packing houses adjacent to the yard and at some distance. These alleys are frequently used for livestock going out into the country by truck and livestock moving from one end of the yard to another, or from one part of the yard to another. These alleys are used, in addition, in the distribution of hay and bedding and cleaning pens. I would consider them more genarally used than any *other alleys in the yards, though all alleys are naturally provided to get around blocks of pens, and no alleys are limited to any specific use and cannot be.* Mr. Christensen attempts to classify the alleys as a specific use, calling some general alleys, and so forth, and as a part of that classification he had this classification of chute alleys. *There is no such thing as a specific use for alleys in stockyard operation. The alleys are like*

streets in the city. They run between blocks in all directions and are used for all purposes of stockyard operation'' (Italics ours)

The Secretary has wide powers, but in rate investigation he must act on evidence. *Northern Pacific Ry. Co. v. Department of Public Works,* 268 U.S. 39 at 44, 45. The grant of the power to regulate does not empower the Secretary to restrict the use or determine the proper use of property, yet that is what his order does, in effect, by denying to appellant any return upon its investment in property which the evidence establishes is in general public use.

In this portion of the brief, appellant attacks the findings of the Court and of the Secretary excluding from its rate base the value of its wholly owned spur or industry tracks, its docks, chutes and holding pens and the alley area on the ground that these findings are contrary to law, unsupported by substantial evidence and arbitrary. We are not much concerned about the trackage for the reasons heretofore stated. Yet we firmly believe that it is a stockyard facility within the definition of the act and that its exclusion is contrary to law. But when the regulatory body excludes from the rate base the value of unloading facilities without which the livestock could not be marketed or handled in commerce, excludes pens which are in general use during peak seasons[40], and alleys which are in constant general use—these facts being established by the undisputed evidence of record—then we insist that the action of the Secretary is arbitrary in the extreme and his findings cannot stand. If this be correct, then it follows that the trial court erred in sustaining these findings.

Note 40—That it is the duty of a utility to be prepared for and have facilities adequate to care for peak demands, see United Railways v. West, 280 U. S. 234 at 248.

IV.

Trader Yardage.

THE FINDINGS OF THE COURT AND OF THE SECRETARY PURSUANT TO WHICH APPELLANT IS REQUIRED TO CHARGE YARD TRADERS ON ALL LIVESTOCK RESOLD OR REWEIGHTED FOR PURPOSES OF RESALE BY THEM A RATE EQUIVALENT TO APPROXIMATELY ONE-HALF THE PRESCRIBED CHARGE ON SALES BY PRODUCERS ARE UNSUPPORTED BY THE EVIDENCE, WRONGFULLY INVADE THE PROPER FUNCTIONS OF MANAGEMENT, ARE ARBITRARY, CONFISCATORY AND DISCRIMINATORY, CONTRARY TO LAW.

The findings of the trial court on this point are contained in Findings Nos. 17-19, inclusive, and are as follows:

> "17. The structure of petitioner's exisiting schedule of rates and charges is such that, with the exception of livestock resold through commission merchants, all yardage charges are assessed and collected from those patrons who cause the livestock to come to the stockyards. It is unjust, discriminatory and unreasonable for petitioner to maintain and set aside a large section of its valuable property for the use of yard traders or speculators and to incur numerous expenses in the rendition of stockyards services to this class of patrons without charge and then remunerate itself for the use of such facilities and for the rendition of such services by increased charges on other patrons.
>
> "18. The traders or speculators ought to pay for services rendered to them substantially one-half of the rates and charges imposed upon those who send their livestock to market for sale. This is a reasonable charge for the services rendered and facilities furnished to yard traders or speculators.
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> "19. While there is considerable similarity in the serveces and facilities afforded to traders or speculators and those afforded to the shippers of livestock,

yet there is sufficient difference in the services rendered, inasmuch as traders or speculators performed some of their own labor, to warrant the imposition of a lower rate or charge upon the traders or speculators than is imposed upon shippers."

These findings are a brief summary of the findings of the Secretary on the same point (R 338 par. 198). Broad statements are made which if true or if supported by substantial evidence would warrant the Secretary's action and the trial court's approval thereof. The appellant has the task of convincing this Court that there is no such supporting evidence and that the policy is one which lies within the sphere of action intrusted by law to the management of the company. Since confiscation of property and invasion of constitutional rights is alleged, the Court can and will weigh and consider the evidence. *St. Joseph Stock Yard Co. v. United States,* 298 U.S. 38 at 50, 52; *Denver Union Stock Yard Co. v. United States,* 57 Fed. (2nd) 735 at 739. The broad statements to which we refer will be hereafter discussed *seriatim.*

It is necessary for the Court to understand more fully the nature of the Denver market in order to determine the questions discussed in this portion of the brief. The Denver Union Stock Yard Company, appellant herein, was organized in 1886 to conduct a public livestock market and has been continuously conducting that market at Denver, Colorado since that time. The sole function of a market—its only reason for existence—is the prompt absorption of the commodity under healthy competitive conditions. It is axiomatic that the more buyers there are on a market bidding for the commodity, the better is the price. Hence to the producer of the commodity, the market outlet and the buyer demand is the all important factor for which he willingly pays.

In the livestock industry, particularly at the Denver market, the *producer* is the farmer, the rancher, and, in the case of sheep, frequently the feeder or fattener. The *buyers* are the packers, the order buyer, the yard trader, who at

Denver also acts as an order buyer, and the feeder. The commission man is the agent of the producer or seller. The packers are only interested in the mature meat animal and the competition for animals of this type is chiefly between the packers. Hence it is important for a healthy active market that the great national packers be represented with adjoining active plants and that local packers be located at or near the market as well. At Denver, there are six packers with sucessfully operating plants and other packers, large and small, are actively on the market through order buyer representation.

The bulk of the receipts and sales at Denver, however, is of the feeder type of livestock. The Denver market is on the eastern edge of the producing or range section of the country, and on the extreme western edge of the feeding or fattening country. Cattle for the most part are matured for market in the grain belt east of Denver, and could not come back to the Denver market as matured animals without an expensive back-haul at local rates. As hereinbefore stated, Denver is what is known as a transit market due to the fact that most of the livestock, including slaughter type of sheep, of necessity find final destination elsewhere and move out of Denver as live animals rather than as meat products. Hence it is that the sorting and sale-in-transit privileges which have been continually in force at the Denver market are so important. These privileges were obtained and have been zealously guarded by appellant, and it is only recently that the sale-in-transit privilege has been permitted in a restricted form at the Missouri River markets. The sorting privilege is not permitted or in force at any of the more eastern markets.

The sorting privilege at Denver is entirely due to the difference in conditions which exist at Denver as compared with markets in the corn belt and in the East. When cattle are driven in the fall of the year off of the forest ranges, the drive is generally made by several owners, all of whom have been utilizing the range for summer feed. The animals are branded, but the only purpose of the brand, so far as the market is concerned, is to insure proper pay-

ment in the event of sale, and all brands are carefully checked at Denver either by or under the supervision of brand inspectors, who are in the direct employ either of the states tributary to the Denver market or of the livestock associations within those states. When the cattle, for example, of these various owners are rounded up and driven to the railroad they filter down various gulleys and arrive frequently at rather widely separated stations on the same road. Since ownership as evidenced by the brand was only important at the market for the purpose of payment, it early became a custom to sort for type irrespective of ownership, and the railroads permitted this sorting and intermingling if the shipments arrived for the same market session from points on the carrier's line. At first this privilege was limited to points reasonably close together, but was subsequently expanded so as to permit shipments from more distant points on the same line to be sorted together. The privilege connected with this operation is not so much the right to sort but the fact that although sorted and reassembled into different carload lots, the benefit of the through rate is not lost thereby (R 949). A specific example of this sorting privilege has already been given in this brief under the discussion of Going Concern Value[41].

Tied in intimately with this sorting privilege is the sale-in-transit privilege which permits livestock to be sold at Denver and moved to the purchaser's destination at the through rate from point of origin to such destination. Even on points as close as the Missouri River markets are to Denver, the saving in the through rate over the combination of local rates is twenty-two cents per hundred on the average (R 947) or approximately $50.00 to $60.00 per car. The purchaser can well afford to and does pay a higher price to the producer for livestock which can be moved out of a transit market such as Denver on through billing, or as it is called in the trade, "with the benefit of the freight" or "on memo" (R 1045). When the destination is farther east than the Missouri River the balance of the through rate is naturally more than twenty-two cents. Whatever

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Note 41—See ante p. 25.

the balance is the purchaser at Denver can afford to pay up to the difference between the combination of locals and the through rate, because his delivered cost is no greater than if he were buying from someone who was not in a position to preserve the through rate or were buying livestock which cannot sell in transit, such as truck receipts. That such prices are paid was testified to by witness Pexton (R 948) and by witness Wolf (R 995). No contrary evidence is in the record, nor could it be. It is important, therefore, at the Denver market that the buying outlet include someone or some class of buyers who can sort, assemble and preserve the freight.

The Secretary's order at various places and in the schedule of rates prescribed (R 346) calls the charge assessed by appellant a "yardage" charge. This is perhaps a matter of terminology, but we believe it typifies a fundamental misconception on the part of the Secretary. Appellant does not so designate that charge in its published tariffs. Tariff number 3 of the Denver Union Stock Yard Company (Government Exhibit 2) designates this charge as a charge *"for the privilege of the market service"* (R 419). We insist it is a marketing charge.

That charge is made only when the livestock is sold. It makes no difference how long the livestock may be in the yards, the same charge is made, namely, under the existing rates, for example, 35¢ a head for fat cattle *when sold*. The only difference between the charges to shipments which remain for differing periods of time, is that since livestock is a commodity which must be fed and cared for, the shipment which is in the yards for three or four days pays three or four days feed as against the shipment which is sold the first day, which only pays one day feed. There is, however, no charge to anyone, producer or buyer, for the use of facilities as such. The marketing charge includes the use of necessary facilities to permit the livestock to be marketed. It is recognized by the Government and is the fact, that livestock can stay in the Denver yards indefinitely and if moved out unsold no marketing

charge, or yardage charge, if the Secretary prefers that term, is assessed or collected. The assessment and collection of the charge only when the livestock is sold has been the practice since the establishment of the markets, and is still the practice at Denver, St. Paul, Kansas City, St. Joseph, Oklahoma City, Sioux City, Sioux Falls, Omaha, Fort Worth, Ogden and Los Angeles. As a practical matter, cattle move out for the most part at Denver within twenty-four to forty-eight hours, and in any event within ten days. The producer desires prompt sale, both to avoid extra feeding costs as well as to avoid the risk of market fluctuations. If he does not receive a satisfactory bid for his livestock at the first or second day market session, the owner moves them to some other market, without the payment of any marketing costs at Denver, because the livestock was not in fact marketed at Denver. If livestock remains in the yard over ten days the transportation privilege is lost, hence it is moved out in any event within that time.

In the ordinary marketing of livestock appellant allocates at certain seasons of the year certain pens or pen areas in the cattle and sheep divisions to packers, commission men, order buyers and yard traders. This is not a leasing of the facilities to these members of the buying side of the market, nor does the allocation confer any rights in and to such pens to those agencies (R 416, 993). It is a matter of a business convenience of the Yard Company, just as in a Piggly Wiggly Store soups, condiments and staples are regularly assigned the same position in each store. The fact that this allocation is solely a matter of market convenience is recognized by the Government in the record, (R 416, 419), and is fully explained in the testimony offered on behalf of appellant (R 887).

We now take up *seriatim* the statements made by the trial court and by the Secretary in their respective findings.

(a) *That the Yard Company maintains and sets aside a large section of its valuable property for the use of yard traders or speculators.*

The evidence of record is to the contrary. The undisputed facts are that the allocation of pens is solely for the convenience of the Yard Company and its patrons in the ordinary conduct of its business and confers no right or title to the allottees by way of lease or otherwise (R 416, 887, 993).

The record further establishes that similar allocations for the same reason are made to all other classes of buyers, namely to the packers, to the commission men and to the order buyers (R 416). Neither the Secretary nor the trial court object to these other allocations nor indicate by the slightest word that in their opinion they constitute free service or an unwarranted delegation of the use of facilities. There was no testimony offered by the Government warranting the singling out of the yard trader since all of the buyers on the market are treated alike so far as the allocation of pens is concerned. This allocation in itself cannot be held discriminatory.

The Government recognizes (R 416) that these allocations can be changed at any time. The record establishes so far as the yard trader is concerned that the allocations are changed at least twice, once during the light season the yards traders are moved down closer to the Administration Building, and once during the Stock Show week when they are moved to the far end of the yard out of the way of stock show cattle. They may be changed at any time, as appellant desires. The commission men's allocations are changed at the same stock show period and for the same reason.

The fact of the matter is, as the evidence discloses, this "large section of its valuable property" is maintained by appellant for its own business, which is the prompt and orderly marketing of the shipper's livestock. The finding and statement are without support in the evidence.

B. *Petitioner incurs numerous expenses in the rendition of stockyard services to this class of patrons without charge and then remunerates itself for the use of such facilities and for the rendition of such services by increased charges on other patrons.*

This is the charge of "free service." It is a product of the Secretary's imagination—a hobby which he has ridden since the 1930 rate investigation at Denver, but which is not supported by the evidence of record.

At the outset it is proper to note that the Government called no yard trader as a witness and called no producer who testified on the point. No yard trader was made a party to this action. The appellant, however, did call a yard trader who happens to be one of the largest, if not the largest dealer on the Denver market, and his testimony appears of record at pages 988 to 1000.

In the preliminary statement in this portion of the brief, we outlined the fact that the buying demand is of primary importance to the producer, and that a market is not a satisfactory market unless it is equiped to absorb the commodity. Livestock happens to be a commodity which differs widely as to weight and flesh condition. Two animals of the same age, on the same range will mature entirely differently. If all shipments which came in were uniform as to type and kind a very different problem would be presented to a market. As stated above it is an important part of the buying demand on the market to have present those who can sort this particular commodity into uniform shipments, preserve the freight and absorb the odd lots. Manifestly the packer cannot do so since he is interested in slaughter livestock. The straight order buyer purchases particular types for which he has orders. The commission man is not equipped to perform this function. It remains for the yard trader to perform it (R 942, 947).

That the yard trader is an indispensible part of the market machinery is clearly established in the record. Government witness Christensen (R 421), testified that it is to the interest of the shipper to have buyers on the market and "it is to the interest of the shipper to have dealers (yard traders) on the market." The producer witnesses were unqualified in their statements to this effect. Witness Pace (R 691) testified that the producer

is interested in the number of buyers on the market "for the more buyers you have the better price you always get." He further testified:

> "The traders are a benefit to the producer and shipper because they buy anything that comes in and which the packer wouldn't touch at all. Somebody has got to do that. If you didn't have your trader I wouldn't know where to go sometimes."

Witness Jamison, another producer, testified (R 791):

> "Yes, the yard traders or dealers are certainly a part of that buying outlet on the market and are certainly beneficial to the producer. I have had the same experience as the other witness, who testified that the traders sometimes were the only market."

Witness Mitchell, another producer, testified (R 802):

> "I think the development of the buyer outlet and the buyer outlet is one of the most important things; it is practically as important, if not more important, to have these order buyers or yard traders as it is to have the packer buyers from the producers' standpoint. It would be a great thing if they could get twice as many buyers on the market as they now have for the man who is producing the livestock. Yes, I heard Mr. Jamison say the more buyers the better off the producer is and you bet I subscribe to that. I like a lot of them when I come to town any time. Yes, the yard trader is very much of a valuable asset to the producer whether he buys as an order buyer or for himself and gambles on the market. In fact I wouldn't want to ship cattle to a market or any place unless I had competition like a yard trader or a speculator or an order buyer with the packers."

Witness Farr, a feeder and fattener of both sheep and cattle, testified (R 942):

> 'The producer, and by that I mean of course the feeder and fattener, is interested in the buying outlet on the market. So, too, in my opinion, is the yard

trader or dealer an important buying outlet on the market. I don't think you could get along without them at all. As I see it, the function of the yard trader on the market is as follows: A range man will ship in his cattle when he rounds them up. He has various grades, sizes and ages. It is impossible for him to grade them at the railroad or at the round-up because he would have to take these back several miles, and it is too expensive, and his practice is to load up,—to just ship them. The commission men are not interested in the mixed lot of stuff, and the average feeder is not. The yard trader can buy these mixed droves of cattle and reshape them and sell them according to grades and classes."

The position of the company, as testified to by Mr. Pexton, the assistant general manager (R 900), which testimony the president of the company stated (R 1169) expressed the considered views of the management of the Denver Union Stock Yard Company, is that the yard trader is an esential part of the demand required upon the market in furtherance of the interest of the producer and that his functions are included in and paid for by the marketing charge; that any charge against the yard trader in the normal exercise of his function would be detrimental to the interests of the producer in that it would lessen competition and weaken the market and that the management is opposed to any such charge.

That the producer knows and understands that as part of his marketing charge he is paying for the buying demand of the yard trader, is abundantly established in the record. There is no contrary testimony.

Under cross examination by Government counsel, witness Jamison, a producer, having testified that if it were not for the yard trader on the market there would be "a lot of days when the producer would fail to sell his cattle" and would be under the necessity of paying the feeding cost, was asked (R 798) whether he thought it right for the producer to pay all of the cost incident to marketing. The witness replied that he did.

This same witness on direct examination testified (R 792) that because the yard trader is a necessary part of the buying outlet on the market he should have whatever is necessary for him to complete the operation without additional charge, and that the producer is already paying, and properly paying, in the marketing charge for whatever service is given to the yard trader. He testified:

> "I think that is all taken care of with the producer; he pays his yardage and I do not know why the other fellow should; you should not have to pay to buy, the man who is selling is the one who pays usually."

Witness Farr, also a producer, testified: (R 943)

> "My testimony in substance is that when the original shipper ships in here and pays his yardage charges that the trader services and facilities which he receives are included in the original yardage charge."

In other words, the testimony of record is entirely contrary to the findings of the court and of the Secretary in this regard. We submit that where the cost of a service is included in the total charge for marketing the commodity, there is, and cannot be, any free service.

A further proof that there is no free service rendered the yard trader lies in the way appelant handles "plants." A plant, within the meaning of the industry, is livestock which the trader turns over to a commission man on the market to sell—"plants" the livestock with a commission man. The existing schedule of rates at the Denver market charges the yard trader the full marketing charge on all the plants because he is then appearing upon the market and using the market machinery in the same way and to the same extent as the producer. He is not then exercising his normal function of absorbing the commodity supply. He has the same right as any other producer in such case to move his cattle out if unsold by the commission man without payment of a marketing charge, but

if his livestock is sold by reason of the market machinery and the market provided by the appellant, he is required to pay the same marketing charge as any other shipper. The rate schedule of the Secretary, approved by the trial court, grants to the yard trader in such case a concession of one-half the usual marketing charge. There can be no justification for this concession and no evidence to support it in the record. As hereinafter pointed out, we insist that this *creates* a discriminatory rate schedule.

(c) *That the existing rates and practices are unjust and discriminatory.*

The practices referred to are the allocation of pens to the yard trader, coupled with the claim that the yard trader is permitted to use those pens for a long period of time.

We have already discussed the question of allocation of pens, and no further need be said.

On the second practice, there is no limitation imposed at any stockyard upon the length of time any buyer or any feeder can ocupy the pens. The Government recognizes that this use by a farmer, for example, can be indefinite if he is willing to pay the feed but there is no charge whatsoever for the use of the facilities. As a matter of fact the great bulk of trader livestock moves out within twenty-four hours (R 992) which is much faster on the average than livestock purchased by farmers and feeders who generaly desire some additional services such as dehorning, dipping and branding. The small amount of longer use by the yard trader is incident to his market function of absorbing odd lots, i.e. the longer use is by animals off-size, off-weight or otherwise not readily marketable, which he has taken on in connection with his cleaning-up of the market. The yard trader has been granted no additional right, however, because all patrons of the market may use the pens for an indefinite length of time. The livestock have already paid the marketing charge.

Both as to allocation of pens, and use of facilities, therefore, all buyers are treated exactly alike, and there is no discrimination between them. There is no discrimination between the shipper and any part of the buying outlet, if such were material, because the shipper in effect is allocated pens through his agent, the commission man, who may use and occupy the pens for an indefinite length of time until the livestock is sold or moved out and if moved out prior to sale no charge whatsoever is made. Hence, we submit that there is no discrimination so far as these practices are concerned.

Nor is there any discrimination under the existing rates as to any charge which is made when the producer sells his livestock on the market through the market machinery he pays the marketing charge. When the yard trader sells livestock on the market through the marketing machinery he pays the same yardage charge under the existing rate schedule, but not under the rate schedule required by the Secretary's order. We submit that the Secretary's rate schedule creates a discriminatory situation which has not heretofore existed at the Denver market and therefore is contrary to the express provisions of the Packers and Stockyards Act, 1921, which prohibits discriminatory rates, charges and practices.

Circuit Judge McDermott in the 1930 rate investigation saw this matter very clearly[42]. In speaking for the majority of the court, he said:

> "A cattleman ships his cattle to a commission man for sale; upon the day of their arrival, the packers are supplied and are not in the market; the demands of the feeders (those who buy to fatten) are presently supplied. The cost of feed at the yards is high; the cattleman requires an immediate market, for he wants to get home. Here is where the trader steps in. He offers a cash market; he either holds the cattle for a few days and sells in the yards or ships to another market.

Note 42—Denver Union Stock Yard Company v. United States, 57 Federal (2nd) 735 at 751, 752.

"Under the present rate structure, the petitioner treats the two classes of buyers alike, that is, no yardage charge is imposed on either, but both pay a handsome price for feed. Under the present structure, the petitioner treats all shippers alike, that is, imposes but one yardage charge, whether the shipper is able to sell to a packer or whether he must sell to a trader. . . . There is no basis for a finding of such discrimination, for the Secretary finds that the trader is one of the two classes of purchasers; and the existing rate structure treats both classes alike.

"Has the Secretary exceeded his power, or invaded the managerial field, by requiring that petitioner exact a charge from yard traders and not of other buyers? The trader operates on a small margin of profit; this charge, if exacted, must necessarily be reflected in the price he pays to the shipper. Has the Secretary the power, therefore, to require petitioner to exact a higher toll from a shipper who must sell to a trader than from a shipper who sells to a packer?

". . . . The evidence is abundant and undisputed that the trader is a vital cog in the machinery of marketing; the record discloses no complaint from any shipper as to the present practice . . . .

"When cattle are shipped to the Denver stockyards, they are destined either for the packing house or the feeding pens. It is a matter of no importance that, in the course of that journey, the title passes through a trader. The exaction of this charge against traders would simply mean that the shipper who is fortunate enough to have his cattle arrive on a day when feeders are at the yards, would pay less for the same service than another shipper whose cattle arrived the day after the feeders have left. In any event, it seems to us to be well within the power of the petitioner to exact but one yardage charge for the service rendered the shipper, whether or not the title to his cattle passes through the hands of a trader. It should always be re-

membered that the stockholders who have risked their means in this enterprise are entitled to some voice in its management. The business has its problems; the stockholders have selected trained and experienced men to solve them; if the directors have honestly adopted a reasonable business policy that is not unfair or discriminatory, we do not feel that the statute vests the Secretary with the power to require them to adopt an experimental policy that he should like to see tried out. It occurs to us that the settled and existing policy of the petitioner is sound; but that is not for us to decide. Neither is it for the Secretary; it is a question of business management, confided by the law and the decided cases, to the owners of the property. We conclude that the Secretary erred in charging against the income of the petitioner a toll which it does not exact, and which the Secretary has no power to require it to exact."

The statement by Judge Symes in his dissent, (page 755) that "it is undisputed that they received services from petitioner, used its property and facilities offered" was as erroneous then as it is now. We deny that it is a matter of discretion for the Secretary to allocate the rates and charges of appellant between various services in the absence of proof that the existing rates are discriminatory. As stated by Judge McDermott the proposed practice of charging one-half rates to traders creates a discriminatory situation.

To enlarge upon this subject a little further, let us suppose two shippers, both with uniform car loads of the same type and class of cattle. Suppose further that the half-yardage charge against traders is in effect. One shipper is fortunate, through his agent the commission man, in finding a country feeder who buys the livestock at the first market session. The other through his agent the commission man sells to a trader. The trader knows under the Secretary's schedule, that he must pay an additional charge on his livestock and this is reflected in the net price to the producer. The cattle of one farmer will pay 30c

while those of the other farmer will pay, in effect, 45c to be absorbed and taken off the market. This was commented upon by Judge McDermott and is the testimony of the producer witnesses in this case (R 693, 793). Or suppose two shippers, one of whom sends in two uniform loads and the other sends in two mixed loads, out of which one load can be sorted equal in every way to either load of the first shipper. The first shipper's livestock find a ready market with country feeders and can move out and do move out on the through rate. No one but a yard trader will purchase the second man's mixed shipments because, as the testimony of record demonstrates, the trader can sort and preserve the benefit of the freight as to the one uniform load at least while the other market agencies cannot and do not do so. Yet his purchase price to the producer will of necessity be lessened if an additional charge is to be assessed against him (R 693, 793). All that either producer wants is the prompt sale of his livestock. Yet one pays less for the service than the other under the Secretary's ruling.

There is no escape from the proposition that this is discriminatory. Government counsel will emphasize the fact that a yardage charge against traders is assessed and has always been assesed in Chicago. The evidence is that Chicago is not a criterion (R 803, 901). Government counsel will say that the propriety of the charge has been recognized by this court in the St. Joseph Stockyard case[43], but we submit that that is not the fact. A reference to that decision shows that the St. Joseph yard had been imposing a half yardage charge on "plants," i.e. re-sales through commission men, which we would admit would itself be discriminatory. The exact question presented in the St. Joseph case was whether or not the estimated income properly reflected the revenues to be received from the trader yardage charge and not whether that charge was or was not proper or created a discriminatory situation. We quote from page 70 of the reported opinion in the St. Joseph case:

Note 43—St. Joseph Stockyard v. United States, 298 U. S. 38 at 70.

"The controversy is over the number of livestock to which the charges . . . . would apply. Appellant challenges the correctnes of the computation . . . . The Government insists that the criticism is unjustified and points to evidence which is said to demonstrate conclusively that the Secretary's figures as to re-sales and re-weights are correct . . . . It is unecessary to recite the evidence. We think the Government substantiates its point."

Government counsel will also point to the District Court decision in *Union Stock Yards Company of Omaha v. United States*, 9 Fed. Supp. 864. A half yardage charge was directed and upheld in that case, which, however, has been abandoned for the most part with the knowledge of the Secretary of Agriculture both at Omaha and at the St. Joseph and Sioux City markets, as demonstrated by the published tariffs, which are a public record on file in the office of the Secretary of Agriculture.

However that may be, the fact remains as demonstrated above that conditions at the Denver market are entirely different from those at the Missouri River markets and Chicago, the Denver market being a transit market. This was the basis of the Interstate Commerce Commission decision in *St. Louis Livestock Exchange v. Alton R. R. et al* 198 I.C.C. 73, known as the sale-in-transit case, wherein the privilege of sale-in-transit and sorting was permitted to remain in at Denver, Ogden and Salt Lake, while being refused at the Missouri River markets, Kansas City and Chicago. Each rate investigation must be determined upon its own facts[44]. For this reason property which may be used or useful at one market may be not used and useful and properly excluded from the rate base at another market. It is no criterion that because a half yardage charge may be imposed at one market it is proper and does not create discrimination if imposed at another market.

The record is devoid of any showing of any complaint by any shipper or producer concerning the existing rate

Note 44—Tagg Bros. and Moorhead v. United States, 280 U. S. 420.

schedule of appellant or attacking the fact that the marketing charge is only assessed against the yard trader when he utilizes the machinery of the market for a resale. Policies of business management so long as they are not clearly unlawful are intrusted by law to the directors of the corporation, and this is as true in the case of a public utility or of a business charged with a public interest as it is in the case of a private concern. The existing practice has been in effect at the Denver market for over fifty years. As stated by witness Pexton (R 900), the management "has ever been awake to ways to increase revenue and long ago would have made a charge had they felt it was in the interest of the yards and its patrons the producer", and yet throughout this entire fifty-two year period no such charge has been made. The management has gone on record in this proceeding that it opposes such a charge as being discriminatory and detrimental to the industry of which it is a part (R 901). We submit that it should require strong proof on the part of the Secretary or a clear case of violation of law to authorize him to disturb or prohibit the continuance of this established practice. As hereinbefore stated, the power to regulate is not the power to manage. In the absence of a showing of ineffciency or improvidence a court will not substitute its judgment for that of the management.

West Ohio Gas Co. v. Public Utilities Commission, 294 U. S. 63 at 72.
Banton v. Belt Line Ry. Corpn. 268 U. S. 413, 421.
Southwestern Bell Telephone Co. v. Public Service Commission, 262 U. S. 276 at 288, 289.
Denver Union Stock Yard Co. v. United States 57 Fed. (2nd) 735, 748.
Brooklyn Gas Co. v. Prendergast, 16 Fed. (2nd) 615, 623.

The regulatory body should not be permitted so to do. The Congressional grant of power under the Packers and Stockyards Act, 1921, does not permit the Secretary's "judgment or discretion" to supply a lack of positive evidence in such case.

V.

Dues, Donations and Subscriptions.

THE FINDINGS OF THE SECRETARY APPROVED BY THE TRIAL COURT, EXCLUDING FROM THE EXPENSE ACCOUNTS OF APPELLANT FOR RATE-MAKING PURPOSES, AN AVERAGE OF $3,000.00 FROM THE "DUES, DONATIONS AND SUBSCRIPTIONS" ACCOUNT OF APPELLANT, IS ARBITRARY, CONFISCATORY AND AN UNWARRANTED INVASION OF THE FUNCTIONS OF MANAGEMENT, CONTRARY TO LAW.

The finding of the Secretary in this connection is contained in paragraph 164 of the Order (R 324). He finds that of the total contributions which "have ranged between $3,000.00 and $4,000.00 a year, an analysis of these items shows that slightly over $300 annually was contributed to activities which benefit Respondent's employes or patrons."

The Court's finding is contained in Finding No. 20 and is almost a verbatim repetition of the Secretary's finding above cited.

The assignment of error upon which we rely is assignment No. 12 (R 1280).

The amount here involved is, in a certain sense trivial, yet it illustrates the arbitrary nature of the Secretary's findings and order. Also, the gross product of the rates is only $2,046.00 in excess of the *allowed* expenses (R 351). If, therefore, these expenses were and are erroneously excluded, the rates fail by $1,000 even under the government computation, to return the minimum fair rate testified to by any witness.

The items eliminated are shown on sheets 4, 5, 6 and 7 of Exhibit 41 (appendix pp 118 to 121). The direct testimony on this subject was given by Assistant General Manager Pexton (R 929) who analyzed the expenditures and stated that no charitable contributions were made to organizations which did not carry on their work, or a large

portion thereof, in the stockyards area among stockyard employes, that the contributions to employee activities were beneficial and that all other expenditures, with the exception of two or three hereafter mentioned, were business or advertising expenses.

The Government particularly criticized the items for Veteran Volunteer Firemen $5.00, Policemen's Protective Association $50, Police & Sheriffs' Association $25 and Letter Carriers $5.00 on the high ground that these public officers are presumed to do their duty and should not be the recipients of gratuities, no matter how small (R 585). The Secretary, with a great show of fairness, also excludes "President's Ball tickets, $18" although we believe that project is primarily for the worthy Hot Springs Foundation to combat infantile paralysis (Gov't Ex. 41, Sheet 6). These particular items are decidedly trivial but the interference with management is irritating.

Perhaps it is the heading of this account which calls it into question. It should be entitled "Miscellaneous Business Expenses and Employee Welfare Donations".

The following brief statement of the evidence of record demonstrates that this finding of the Secretary and of the court is without support in the evidence:

As to the donations, the Government auditor admitted that the president of the company stated to him that the church donations were to churches in the stockyard community attended by employees and exerting a moral influence in the community (R 579). The auditor said he did not check up on this statement but assumed that the donations on account of the employes was "a very small proportion, however, I know nothing about it".

As to the Denver Chamber of Commerce, the Junior Chamber of Commerce (Denver branch), the United States Chamber of Commerce and the Colorado Association, memberships in these organizations were excluded because they were community enterprises. He neither knew nor took the trouble to find out that the local Chambers of Com-

merce have livestock committees interested in the entire state-wide industry (R 578) and the Colorado Association, likewise (R 585). The auditor eliminated the membership expense in the Denver Livestock Exchange (appendix p 118) which is the association of the agencies on the Denver Market handling patrons' livestock, membership in which is considered essential by the management (R 933).

The basis for exclusion by the Government auditor as stated was "Whenever I could not see that the patrons were receiving any benefit, I disallowed the amount". (R 557). The Secretary's basis is given in paragraph 164 of the order (R 324) as follows:

> " . . . the guide has been that those contributions which are of *peculiar* benefit to respondent's employes and patrons *should* be covered into rates and the remainder of them should not be." (Italics ours).

Witness Collins, the only producer called by the Government, testified that in his opinion, the appellant, like any other business, should have the right to make donations as a business expense so long as the right was not abused (R 538) and that the regulatory power should go to the question of abuse rather than to the particular item (R 544).

The excluded items are in total, about 3/10 of 1% of the gross product of the rates (R 936), which belies any question of abuse.

All of these expenditures were analyzed in detail by the management (R 929-937) and their propriety established. We submit that memberships in the business organizations dealing directly with the livestock industry, traffic problems and business practice are legitimate. These total $1,268.91. All such expenditures are recognized as proper items of business expense by the Bureau of Internal Revenue (Reg. 94 Art 24 (a)1).

We submit that the annual donations to welfare organizations, working for the benefit of our employes is an expenditure, even though narrowly viewed, which bene-

fits the patrons of the market. Employer-employee relations necessarily affect the interests of the patrons. The evidence that the charitable contributions are of this nature is not only direct and undisputed but the government auditor, whose audit is taken as the sole basis of analysis by the Secretary, as shown by his finding, said that he had not bothered to investigate and knew nothing about it. The positive testimony concerning the Community Chest donation is that

> "its agencies spend a substantial amount of its income in and around the stockyards district. Nurses and others representing organizations of the Chest call on and are of assistance to our employes or ex-employes and generally contribute to their general welfare" (R 929).

Certainly the amount of the contribution is not excessive or extortionate, or gives any indication of abuse of discretion on the part of the management. One thousand dollars a year is about as small an amount as a $4,000,000 or $5,000,000 corporation could give with decency to such a cause.

It may be argued by government counsel that the same procedure was followed in the St. Joseph Stockyards case by the Secretary and the eliminations were therefore approved by this court in its decision of the appeal in that case.[45]

The question is not noticed in the opinion of this Court and in the opinion of the court below, reported in 11 Fed. Supp. 322 at 337, it is stated that the eliminations are "supported by the evidence." That may well have been the fact in the St. Joseph Stock Yard case but the evidence above cited to this court, being all of the evidence introduced upon the subject, demonstrates that *there is no evidence of record here to support these eliminations.*

In *Mobile Gas Company v. Patterson,* 293 Fed. 208, it was held that reasonable contributions by a gas company to

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Note 45—St. Joseph Stock Yard Co. v. U. S. 298 U. S. 38.

local charities were not improperly charged to operating expenses, the court saying (p. 226).

> "It may be observed, however, that in our highly developed civilization with its numerous complexities, good citizens, including well conducted public utility corporations, voluntarily contribute small amounts to charity, hospitals and other benevolent institutions operating as a part of the life of a given community."

Dealing with this exact problem, the court in the *Denver Union Stock Yard Company v. United States*, 57 Fed. (2d) 735 at 753, said:

> "The test applied by the Secretary is rather narrow. If the stockholders or directors of a corporation are willing that their corporation do its part in a reasonable way, in carrying the public load of the community the prosperity of which is closely interwoven with its own, it would seem to be an exercise of managerial power not subject to the veto of a public official concerned only with the protection of the public against extortion."

In the face of the complete absence of supporting evidence, we submit that the action of the Secretary is an unwarranted interference with the functions of management and that the findings of the Secretary and of the Court are arbitrary and unlawful.

VI.

THE SECRETARY AND THE COURT ERRED IN FAILING TO PROVIDE PROPER ALLOWANCES FOR AMORTIZATION OF THE EXPENSES OF HEARINGS UNDER THE PACKERS AND STOCKYARDS ACT, 1921. THE FINDINGS OF THE SECRETARY AND OF THE COURT IN THIS MATTER ARE UNSUPPORTED BY THE EVIDENCE, ARBITRARY AND CONFISCATORY.

The finding of the Secretary is contained in paragraph 163 of the order (R 324). The Secretary states therein that

the audit shows an average annual expenditure during the five year period, 1930-1934 inclusive, on account of the expense of hearings, of $8,786.88 and that during that period there was more investigational work "than is likely to be the case when once the reasonableness of the rates charged by respondent has been finally determined . . . It is to be presumed that there will be less expense in the future on account of this item than there has been during the last five years. It is found, therefore, that $100 a month or $1,200 annually should be covered into rates on account of this item."

The court, in Finding No. 21 (R 1254) finds:

> "$1,200 annually is a proper amount to cover into rates for future expenses on account of hearings under the Packers and Stockyards Act."

The assignment of error upon which we rely is assignment No. 13 reading as follows:

> That the Court erred in failing and refusing to enter a Finding substantially in accord with suggested Finding entitled "Packers' and Stockyards' Administration Expense" requested by petitioner and on the contrary, finding in paragraph 21 of the Findings of Fact herein that "$1200 annually is a proper amount to cover into rates for future expenses on account of hearings under the Packers and Stockyards Act", for the reason that said Finding as entered fails to amortize over a reasonable future period or at all the costs and expenses of the present litigation, fails to recognize and take into account the fact that rate investigations are of necessity recurrent, is contrary to the evidence, unsupported by the evidence, arbitrary, contrary to law and operates to confiscate petitioner's property.

The assignment of error clearly defines the issue. It is devoutly to be hoped that litigation will be less frequent in the future than it has been in the past, but nevertheless, a rate built upon the theory of a net income left after deduction of expenses from gross income, which expenses do not make any allowance for the amortization over a reason-

able period of expenses already incurred, is necessarily arbitrary and, we believe, confiscatory.

By stipulation of the parties (R 363) it was agreed that the expenses of the pending rate hearing total $40,439.27. We submit that a reasonable period of amortization is five years, not only because it has been so held[46] but because the government economist and rate expert, Dr. Dozier, testified repeatedly that all of his computations were on the basis of a rate which would continue in effect for "four or five years" (R 613, 625). Amortized on that basis the annual expense item which should have been figured in determining whether or not the rate structure would be fair and compensatory, would be approximately $8,000. instead of $1,200. as allowed by the Secretary. This represents a difference equivalent to $105,000. of rate base value and is substantial.

Government counsel will cite to the court the case of *Columbus Gas & Fuel Company v. City of Columbus*, 17 Fed. (2d) 630 at 640, which case enunciates the principle that if rates are not already inadequate the law suit cannot be permitted to make them so. That case, however, is adequately distinguished in the opinion of this court in *West Ohio Gas Company v. Public Utilities Commission*, 294 U. S. 63 at 74.

As in the West Ohio case, the Secretary of Agriculture, like the Public Utilities Commission, has authority to and did substitute another rate schedule. The language of this Court is directly in point:

> "Thus viewing them, we think they must be included among the costs of operation in the computation of a fair return. The company had complained to the Commission that an ordinance regulating its rates was in contravention of the statutes of the state and of the Constitution of the nation. In that complaint it prevailed. The charges of engineers and counsel, incurred in defense of its security and perhaps its very

Note 46—57 Fed. (2d) 735 at 754.

life, were as appropriate and even necessary as expenses could well be . . .

If the rates are inadequate to the point of confiscation, the complainant has no need, it is said, to count upon the expense of the lawsuit; if they are not already inadequate, the lawsuit cannot make them so. *Cf. Columbus Gas & Fuel Co. v. City of Columbus*, 17 F. (2d) 630, 640. An argument to that effect runs through some of the decisions, though we are not required now either to accept or to reject it. But the case is different where a commission, after setting a schedule of rates aside, is empowered to substitute another to take effect by retroaction and cover the same years. *In determining what the substitute shall be, the commission must give heed to all legitimate expenses that will be charges upon income during the term of regulation, and in such a reckoning the expenses of the controversy engendered by the ordinance must have a place like any others.*" (Citing the *Denver Union Stock Yard* case and other cases). (Italics ours).

To the same effect see *New York and Richmond Gas Co. v. Prendergast*, 10 Fed. (2d) 167.

Monroe Gaslight Co. v. Michigan Public Utilities Commission, 11 Fed. (2d) 319 at 325.

New York & Queens Gas Co. v. Prendergast, 1 Fed. (2d) 351 at 357.

Mobile Gas Co. v. Patterson, 295 Fed. 208 at 224.

We do not believe that Mr. Justice Cardozo intended that such charges should be figured in the expense account (and therefore indirectly in the rate base) only if the utility were successful in its contentions that the prescribed rate was confiscatory or otherwise unlawful. It is a question of good faith and if the regulated industry believes that the regulatory body has invaded its constitutional rights, it is not only the privilege but the duty of the management, on behalf of its stockholders, to resist that invasion. This principle is clearly stated in *Mobile Gas Co. v. Patterson*, supra, from which we quote as follows (293 Fed. 208, 224):

"It is unquestionably a part of prudent business on the part of a utility to resist the imposition of any rate which it may have reasonable ground for believing to be confiscatory. This is true even if it is finally adjudged that the rate is not confiscatory, provided only the resistance is in good faith and is justified by reasonably prudent judgment in the ordinary conduct of business, and there can be no question of the right of the utility to incur such expense as a part of its operating expense, where, as in this case, the rate resisted is adjudged to be confiscatory. It is unnecessary to pass upon the amount of this allowance, as the conclusion of confiscation is clear without it. The question as to the period over which such an expense should be amortized is a question of judgment, and I am of the opinion that a period of five years is appropriate."

The $1,200. annual allowance does not include any amortization but is stated by the Secretary to be only for future expenditures which he presumes will be greatly reduced. Engaged in business 2000 miles from the seat of government, it is doubtful if the allowance is sufficient for even that purpose, but we do not attack it on that ground. We do attack the findings because, having excluded this expense from the account of appellant, although actually incurred and in large part paid, appellant is not permitted to recoup the same during any future period by amortizing this expense over a reasonable period. This, we submit, is arbitrary and contrary to law.

VII.

THE COURT ERRED IN FINDING THAT $536,825.00 IS THE VALUE OF THE USED AND USEFUL LAND OF APPELLANTS FOR THE REASON THAT SAID FINDING IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

The question at issue can be briefly presented. If the government land appraiser was a qualified expert, then the findings of the Secretary and of the trial court are based upon substantial evidence and we admit that the court,

under the authorities cannot set those findings of the administrative agency aside.

The decision of this point resolves itself around the question as to what is the nature of the knowledge which renders the opinion of one man admissible in evidence as having probative value and that of another wholly inadmissible. It is not necessary to go afield and discuss the training and experience qualifications of one offering his opinion on scientific or medical problems, or problems of economics, criminology, etc. The question here presented is the qualification of one as an expert on land values.

In *Wigmore on Evidence*, Vol. 1, Sec. 718, it is stated:

> *Knowledge must be of value in the vicinity.* Since value is the exchangeable rate accepted by the community, it is obvious that the rate may differ, in passing from one region to another, where different conditions prevail and a different judgment would be formed by the local community. . . .
>
> The witness' competency must here depend upon whether the conditions of value in the two places are sufficiently similar to render his knowledge of values in one place adequate for estimating them in the other. The application of this principle must depend on the circumstances of each case, and no further detailed rules can be laid down. . . .

The point is that local knowledge is essential to qualify one who presents himself as an expert in land values and offers his opinion in evidence. Without such specialized knowledge, the evidence is not substantial.

The Government appraiser, Mr. Zelinski, is a witness of the highest educational qualifications. He is a trained engineer. His structural appraisal on the basis of unit costs of material and labor were accepted by appellant without question. His land appraisal is not so accepted.

He testified (R 497) that until called in this case, he had never appraised any land in Denver, and that he had made no study of the value of other industrial tracts in

Denver (R 516). He testified that he "just investigated such data as had been used in the other proceedings and some supplemental information further down towards town" which he got from the Interstate Commerce Commission (R 517). This last is hearsay. (1 *Wigmore on Evidence* Sec. 719). Yet his appraisal figures were accepted *in toto* by the Secretary and approved by the trial court.

Granting the educational qualifications of the witness and his experience in eastern railroad land appraisals, the record discloses a complete unfamiliarity with the value of industrial tracts in and around Denver. He testified that he had never assembled an industrial tract (R 496). He attempted to base his appraisal in part upon comparative sales of adjoining property.

In one of those sales the Government witness had the figures as to land values and improvement values, wholly reversed. This was in the case of the Murphy barn sale (R 516). After his attention was called to this, the witness stated that if he was wrong, the sale would reflect a higher value per acre on the zones than he had given. It was admitted before the hearing was over that the figures as used by the witness were in fact reversed and consequently the Examiner in the Tentative Findings (R 88) in balancing the evidence, and upon the statement of the witness that a reversal of the figures would reflect a higher value per acre for the Zone, increased the value $500.00 per acre in Zone 1, $1,000.00 per acre in Zone 2, and $754.00 per acre in Zone 9, the three zones affected by the Murphy sale. On this basis, the Examiner increased Mr. Zelinski's land appraisal $34,000.00. The Secretary disregarded the findings of the Examiner who heard and weighed the evidence, and without any contrary finding or excuse, adopted unchanged the appraisal figures of Mr. Zelinski made before he had discovered the error in his basic information. We do not contend that the Secretary was bound by the tentative findings of his Examiner. We do contend, however, that these facts further demonstrate that the findings of the Secretary in this particular are not based on substantial evidence.

That the witnesses called by appellant to appraise its land were qualified by local knowledge and from twenty-five to thirty-eight years of appraisal experience is admitted by the Government (Order, R 272). We submit that theirs is the only substantial evidence—the only evidence based on knowledge and experience in the locality, which appears of record in the case. It may perhaps be true that these witnesses gave some weight to the potential value of the site, due to its special adaptation to stockyard use. That is not prohibited by the *Minnesota Rate Cases.*[47]

On the basis of a long familiarity with the property and surrounding values, including four separate appraisals from 1920 to 1935 (R 776), appellant's appraisers, acting as a board of appraisal, fixed the present value of the lands at $1,645,552.50 (R 701). The Government appraiser fixed the value at $728,284. We agree with the Secretary (R 274) that this difference is too great to be accounted for as a difference of opinion between well qualified and competitive land experts. We insist that upon the admissions of the Government witness himself, he is not an expert qualified by knowledge and experience to appraise a complicated industrial property in Denver, Colorado.

His evidence is not substantial, therefore, and the findings based thereon are not supported by substantial evidence, as required by law.

VIII.

THE COURT ERRED IN FINDING THAT THE RATE OF RETURN OF 6½% AS FIXED BY THE SECRETARY IS A FAIR AND JUST RETURN UPON THE FAIR VALUE OF APPELLANT'S PROPERTY USED AND USEFUL IN RENDERING STOCKYARD SERVICES.

The principle upon which it must be determined whether or not a rate of return is fair and just, was stated thirty years ago by this court and there has been no change therein. In *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, at 48, it is said:

Note 47—230 U.S. 352 at 451.

"There is no particular rate of compensation which must in all cases and in all parts of the country be regarded as sufficient for capital invested in business enterprises. Such compensation must depend greatly upon circumstances and locality; among other things, the amount of risk in the business is a most important factor, as well as the locality where the business is conducted and the rate expected and usually realized there upon investments of a somewhat similar nature with regard to the risk attending them."

The question, therefore, is whether or not the Secretary gave proper effect to the evidence of record concerning the risks of appellant's business and the rate expected and usually realized in businesses of a similar nature in this locality. We believe it will be admitted that except in the cases where the regulated industry is a utility operating under a monopolistic franchise or governmental grant, and consequently protected against competition from a similar utility, no rate of return as low as 6½% has been upheld by the courts up to this time as non-confiscatory. It does little good, however, to cite decisions of this or any other court made many years prior to this date because of the drastic change in economic conditions. Cases which have been decided, however, since 1929, and during the depression from which we have not yet emerged, are of authoritative force.

In *St. Joseph Stock Yards Company v. United States*, 298 U.S. 38, in which the hearing before the Secretary was held in January and February, 1933, and order entered May 4, 1934, the Secretary prescribed and found as fair and reasonable, a rate of return of 7%. The order of the Secretary was approved and upheld by this Court April 27, 1936.

In *Denver Union Stock Yard Company v. United States*, 57 Fed. (2d) 735, in which the hearing was held in February of 1930 and order entered July 28, 1931, the Secretary fixed as fair and reasonable, a rate of return of 7½% and this was upheld by the statutory three-judge court on April 4, 1932.

In *Union Stock Yards Company of Omaha v. United States*, 9 Fed. Supp. 864, the order of the Secretary dated March 1, 1933, provided a rate of return of 7½% as being fair and reasonable.

It cannot be denied that these are all businesses of a similar nature to that of appellant and the record is silent as to any conditions in those markets which are different from conditions existing in 1935 and at the present time at appellant's market.

The government called as its expert on this matter, Howard D. Dozier, who is the Economist for the Packers and Stockyards Division, Bureau of Animal Industry, Department of Agriculture (R 611). He presented as exhibits, tabulations on yields on government bonds, which yield he called the "basic interest rate," the yield on public utility and industrial bonds and stocks for approximately a ten-year period and a tabulation which showed, according to the witness, the yield on what he called the "net worth" of stockyards. This stockyard list, however, when examined was shown to include auction lots, concentration points and other small enterprises which never have desired nor needed public financing and which are in no wise comparable. He gave it as his opinion that these exhibits showed a decrease of 1% over 1930 in average yield and therefore he recommended a rate of return *between* 6½% and 7% (R 651), his exact language being:

> "Yes, I have stated that I thought the zone of reasonableness for the next few years would be between 6½% and 7%."

The importance of the stated 1% drop in interest rates is that it is by way of reconciliation of the testimony of the witness in the instant case with his testimony in the previous rate investigation that the zone of reasonableness lay between 7½% and 8%.

He admitted (R 640) that no public utility on his exhibit was comparable to The Denver Union Stock Yard Company either in size, amount of the issue or any other factor. He further stated (R 641):

"I think there is no industry on either of the lists (referring to his exhibits) which I have given you which is closely comparable to The Denver Union Stock Yard Company."

These statements are manifestly true when it is considered that his scheduled corporations were all national concerns, listed on national exchanges, and comprised such utilities as American Water Works, American Telephone & Telegraph, International Telephone and Telegraph, and such industrial concerns as United States Steel, the Standard Oil companies, American Tobacco, General Electric, etc.

Respondent's witness was an investment banker of twenty-seven years' experience and well qualified to speak authoritatively concerning stockyard securities (R 1131 et seq.). He testified that he examined the securities listed on Government Exhibit 45 offered by Dr. Doizer and that none of the companies were comparable to The Denver Union Stock Yard Company (R 1138).

In discussing the risks and hazards of the business the witness emphasized the competitive nature of the business; that the Denver market of appellant is in constant competition with the other stockyards, with auction yards and with direct buying. He emphasized the hazard of weather, disease, the seasonal and fluctuating character of the Denver market, and the hazard of the freight rate situation (R 1140).

The witness introduced Respondent's Exhibit 45 which showed that the composite return for the stockyards operating at Wichita, Omaha, St. Paul, Fort Worth, Kansas City, St. Joseph and Sioux City in 1932 was 8.2%. In 1934, the composite earnings of these yards averaged 9.923% but it was recognized that both 1933 and 1934 were abnormal years to the extent that 1933 was affected by the government hog buying program, and 1934 by the government cattle and sheep buying program occasioned by the drought. On the basis of the above testimony and his knowledge of and experience in the sale of stockyard securities, this witness gave as his opinion that the fair and reasonable rate of return in this case would be 8%.

It is manifest from the record that the testimony of the government witness does not comply with the principles enunciated by this Court in the Willcox case, supra. There was no attempt to give comparative figures on similar industries in the same trade territory. This same principle was again enunciated by this Court in *Bluefield Water Works & Improvement Co. v. Public Utilities Commission*, 262 U.S. 679 at 692. The Secretary, nevertheless, adopted the minimum rate of return to which the government witness had testified, namely, 6½%.

No allowance whatever was made for any safety factor. As stated by this Court in *United Railways v. West*, 280 U.S. 234 at 251, 252:

> "It is manifest that just compensation for a utility, requiring for efficient public service skillful and prudent management as well as use of the plant, and whose rates are subject to public regulation, is more than current interest on mere investment. Sound business management requires that after paying all expenses of operation, setting aside the necessary sums for depreciation, payment of interest and reasonable dividends, there should still remain something to be passed to the surplus account; and a rate of return which does not admit of that being done is not sufficient to assure confidence in the financial soundness of the utility to maintain its credit and enable it to raise money necessary for the proper discharge of its public duties."

That no leeway whatsoever is provided, is demonstrated by the stipulation (R 359) introduced at the time of the trial in the court below. That stipulation takes the receipts for the years 1935-6, applies thereto the rates prescribed in the Secretary's order, deducts therefrom the expenses computed by the government auditors in accordance with government theories, and shows a return of 6.1% on the allowed rate base of $2,792,700 in 1935, and a return of 6.74% upon the same rate base in 1936, or an average for the two years, under the Secretary's rates, of 6.42%.

If, as we contend, even on the government theories, that the income directly due to the livestock show in the amount of $11,592,[48] should be deducted, if the stock show properties are to be excluded from the rate base, the rate of return under the facts admitted by the stipulation, would have been reduced to 5.68% in 1935 and 6.33% in 1936, or an average of 6% for the two-year period.

We submit that the rate of return is not only inadequate to permit maintenance of credit, but also is less than the return reasonably expected by and allowed to similar concerns. It is therefore unjust, unreasonable and confiscatory.

CONCLUSION

For the reasons hereinabove urged, we respectfully submit that the decision of the lower court should be reversed, and the enforcement of the order of the Secretary of Agriculture of February 17, 1937, should be permanently enjoined.

This is a case which is necessarily dependent for its determination upon a demonstration to this Court that the findings of the trial court and of the Secretary are not supported by the evidence of record. It has been necessary, therefore, to quote from and point to that record at some length. We ask the Court's indulgence if we have done so too extensively.

ROBERT G. BOSWORTH,
NORMAN A. HUTCHINSON,
WINSTON S. HOWARD,
Counsel for Appellant.

PERSHING, NYE, BOSWORTH & DICK,
Denver, Colorado.
Of Counsel.

Note 48—See ante p. 49 et seq.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 798

DENVER UNION STOCK YARD COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA AND SECRETARY OF AGRICULTURE,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

APPENDIX TO APPELLANT'S BRIEF.

STATUTES INVOLVED.

The pertinent provisions of the *Packers and Stockyards Act, 1921,* (U. S. C. A. tit. 7, secs. 181-229) are as follows:

§*201. "Stockyard owner"; "stockyard services"; "market agency"; "dealer"; defined.* When used in this chapter—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in com-

merce, of livestock; (Aug. 15, 1921, c. 64, §301, 42 Stat. 163.)

§202. *"Stockyard" defined; determination by Secretary as to particular yard.* (a) When used in sections 201 to 217, inclusive, of this chapter the term "stockyard" means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. Sections 201 to 217 inclusive of this chapter shall not apply to a stockyard of which the area normally available for handling livestock, exclusive of runs, alleys, or passage ways, is less than twenty thousand square feet. (Aug. 15, 1921, c. 64, §302, 42 Stat. 163.)

§205. *General duty as to services.* It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard: *Provided,* That in any State where the weighing of livestock at a stockyard is conducted by a duly authorized department or agency of the State, the Secretary, upon application of such department or agency, may register it as a market agency for the weighing of livestock received in such stockyard, and upon such registration such department or agency and the members thereof shall be amenable to all the requirements of this chapter; and upon failure of such department or agency or the members thereof to comply with the orders of the Secretary under this chapter he is authorized to revoke the registration of such department or agency and to enforce such revocation as provided in section 216 of this title. (As amended May 5, 1926, c. 240, 44 Stat. 397.)

§206. *Rates and charges generally; discrimination.* All rates or charges made for any stockyard services

furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful. (Aug. 15, 1921, c. 64, §305, 42 Stat. 164.)

§208. *Unreasonable or discriminatory practices generally.* It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful (Aug. 15, 1921, c. 64, §307, 42 Stat. 165.)

§210. *Proceedings before Secretary for violations generally; action to enforce order of Secretary.* (c) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of sections 201 to 217 inclusive of this chapter, or concerning which any question may arise under any of the provisions of sections 201 to 217 inclusive of this chapter, or relating to the enforcement of any of the provisions of sections 201 to 217 inclusive of this chapter. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money. (Aug. 15, 1921, c. 64, §309, 42 Stat. 165.)

§211. *Order of Secretary as to charges or practices; prescribing rates and practices generally.* Whenever after full hearing upon a complaint made as provided in section 210 of this chapter, or after full hearing under an order for investigation and hearing made

by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed. (Aug. 15, 1921, c. 64, §310, 42 Stat. 166.)

§214. *When orders effective generally.* Except as otherwise provided in this chapter all orders of the Secretary under sections 201 to 217 inclusive of this chapter, other than orders for the payment of money, shall take effect within such reasonable time not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, according as is prescribed in the order, unless such order is suspended or modified or set aside by the Secretary or is suspended or set aside by a court of competent jurisdiction. (Aug. 15, 1921, c. 64, §313, 42 Stat. 167.)

§215. *Failure to obey orders generally; punishment.* (a) Any stockyard owner, market agency, or dealer who knowingly fails to obey any order made under the provisions of sections 211, 212, or 213 of this chapter shall forfeit to the United States the sum of $500 for each offense. Each distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense. Such forfeiture shall be recoverable in a civil suit in the name of the United States.

(b) It shall be the duty of the various district attorneys, under the direction of the Attorney General, to prosecute for the recovery of forfeitures. The costs and expense of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. (Aug. 15, 1921, c. 64, §314, 42 Stat. 167.)

§217. *Proceedings for suspension of orders.* For the purposes of sections 201 to 217 inclusive of this chapter, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of sections 201 to 217 inclusive of this chapter, and to any person subject to the provisions of sections 201 to 217 inclusive of this chapter. (Aug. 15, 1921, c. 64, §316, 42 Stat. 168.)

§226. *Powers of Interstate Commerce Commission Unaffected.* Nothing in this chapter shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such commission. (Aug. 15, 1921, c. 64, §406, 42 Stat. 169.)

TYPICAL PAGES OF GOVERNMENT EXHIBITS ON VALUATION OF STRUCTURES

CATTLE DIVISION STANDARDS

(Gov't Ex. 29, p. 159)

		MATERIAL Unit Price	MATERIAL Total	LABOR Unit Price	LABOR Total
Gate "A"—5 rail, low stile, 10' long					
Rails 5 @ 2x6x10'0" FBM	50				
Hinge stile 2 @ 2x6x5'3"	11				
End stile 2 @ 2x6x4'9"	10				
Inter. stile 2 @ 2x6x4'9"	9				
Brace stile 1 @ 2x6x10'6"	11				
Brace 1 @ 2x6x11'6"	11				
Blocking 2 @ 2x6x3'0"	6				
Hinge cleats 2 @ 2x6x1'6"	3				
111 Total + 10%	MBM	0.122	34.25	4.18	30.60	3.73
Bolts ½"x8"	ea	3	0.06	0.18	0.06	0.18
Paint numbers on gates	ea	2	0.03	0.06	0.15	0.30
Hauling and hanging	ea	1	.....	.....	0.72	0.72
Total				4.42		4.93
Summary of "A" Gates						
Length 14'0" FBM 153 Panel 2				5.48		5.96
" 12'0" " 138 " 2				4.95		5.45
" 10'0" " 122 " 2				4.42		4.93
" 9'0" " 115 " 2				4.17		4.69
" 8'0" " 107 " 2				3.92		4.45
" 7'0" " 100 " 2				3.67		4.20
" 6'0" " 88 " 1				3.25		3.81
" 5'0" " 78 " 1				2.91		3.49
" 4'0" " 68 " 1				2.57		3.16
" 2'6" " 50 " 1				1.95		2.58

CATTLE DIVISION STANDARDS

(Gov't Ex. 29, p. 160)

		MATERIAL Unit Price	MATERIAL Total	LABOR Unit Price	LABOR Total
Gate "B"—5 rail, high stile, 10' long					
Rails 5 @ 2x6x10'0" FBM	50				
High stile 2 @ 2x6x7'0"	14				
End stile 2 @ 2x6x4'9"	10				
Inter. stile 2 @ 2x6x4'9"	9				
Braces 1 @ 2x6x12'0"	12				
Braces 2 @ 2x4x6'2"	8				
Blocking 1 @ 2x6x3'0"	3				
106 Total + 10%	MBM	0.117	34.25	4.01	30.60	3.58
Paint numbers on gate	ea	2	0.03	0.06	0.15	0.30
Hauling and hanging	ea	1	.....	.....	0.72	0.72
Total				4.07		4.60
Gate "C"—6 rail, 10' long						
Rails 6 @ 2x6x10'0" FBM	60				
High stile 2 @ 2x6x5'6"	11				
End stile 2 @ 2x6x5'0"	10				
Inter. stile 2 @ 2x6x5'0"	10				
Brace 1 @ 2x6x10'8"	11				
2 @ 2x4x6'6"	9				
Hinge cleats 2 @ 2x6x1'6"	3				
114 Total + 10%	MBM	0.125	34.25	4.28	30.60	3.83
Bolts ⅝"x7"	ea	2	0.06	0.12	0.06	0.12
Hauling and hanging	ea	1	.....	.....	0.72	0.72
Paint numbers on gates	ea	2	0.03	0.06	0.15	0.30
Total				4.46		4.97

(Gov't Ex. 30, p. 251

SHEEP BARN—S-1.

			MATERIAL Unit Price	MATERIAL Total	LABOR Unit Price	LABOR Total
STANDARDS—First Floor						
Pen Gates—10'0" long						
5 pcs. 2x6x10'0" FBM	50					
1 pc. 2x6x11'0"	11					
2 pcs. 2x4x6'0"	8					
3 pcs. 2x6x4'0"	12					
2 pcs. 2x6x4'6"	9					
2 pcs. 2x6x2'6"	5					
Total + 10%	MBM	.105	34.25	3.60	30.60	3.21
Hardware—						
Bolts—½"x8"	ea	3	0.06	0.18	0.06	0.18
Strap pintle hinges						
2 pcs. ½x2x37", strap						
2 pcs. ½x2x25" pintle	prs.	2	1.75	3.50	0.20	0.40
Bolts—⅜"x6"	ea	8	0.05	0.40	0.05	0.40
⅜"x8"	ea	2	0.06	0.12	0.06	0.12
⅜"x10"	ea	2	0.07	0.14	0.07	0.14
6" hook bolt	ea	1	0.10	0.10	0.10	0.10
10" hook bolt	ea	1	0.15	0.15	0.10	0.10
Lock hook	ea	1	0.25	0.25	.....	.....
Padlock	ea	1	0.65	0.65	0.10	0.10
Numbers painted, two sides	ea	1	0.06	0.06	0.30	0.30
Hauling and hanging	ea	1	.....	.....	0.72	0.72
TOTAL COST OF ONE PEN GATE				9.15		5.77

(Gov't Ex. 30, p. 255

Gate At Scale—5'0" long						
5 pcs. 2x6x5'0" FBM	25					
2 pcs. 2x6x4'0"	8					
2 pcs. 2x6x4'6"	9					
2 pcs. 2x6x5'6"	11					
2 pcs. 2x6x2'6"	5					
Total + 10%	MBM	.064	34.25	2.19	30.60	1.96
Hardware—						
Standard gate strap hinge, hook and two staples	prs.	2	2.05	4.10	0.30	0.60
Hauling and hanging	ea	1	.....	.....	0.60	0.60
Total Cost of Gate				6.29		3.16
CUTTING CHUTE						
5 pcs. 1x6x18'0" FBM	45					
1 pc. 2x6x18'0"	18					
2 pcs. 2x6x6'0"	12					
2 pcs. 2x6x3'0"	6					
Total + 10%	MBM	0.89	34.25	3.05	18.65	1.66
14'0" Gate—						
4 pcs. 1x6x14'0" FBM	28					
1 pc. 1x6x14'6"	7					
2 pcs. 1x6x7'0"	7					
4 pcs. 1x6x3'0"	6					
2 pcs. 1x6x4'0"	4					
Total + 10%	MBM	0.57	34.25	1.95	30.60	1.74
Standard strap & pintle hinges	pr.	2	1.75	3.50	0.20	0.40

STANDARDS S2

(Gov't Ex. 30, p. 307)

			MATERIAL Unit Price	MATERIAL Total	LABOR Unit Price	LABOR Total
Standard Double Manger						
Cost of one 39 ft. length.						
20—2"x6"x3'3" FBM	65					
16—2"x4"2'6"	27					
3—2"x8"x39'	156					
7—2"x8"x39'	364					
2—2"x2"x39'	26					
Total 638 FBM + 10%	MBM	0.702	34.25	24.04	18.65	13.09
Cost of one 14 ft. panel				8.62		4.70
Standard Water Trough—Double with Guard						
Average length 14'3"—42" wide x 12" av. height—2 openings 12" wide x 8½" deep x 13'3" long with drain and plug, cast in place.						
Concrete	c.y.	1.26	5.24	6.60	3.00	3.78
Forms	s.f.	90	0.02	1.80	0.08	7.20
Reinforcing steel	lbs.	51	0.03	1.53	0.02	1.02
2" nipple and plug	lot	1	0.35	0.35	0.10	0.10
Guard						
Lumber 2—2"x6"x14'3"	29 FBM					
4—2"x6"x1'9".	7					
Total add 10% 36 FBM	MBM	0.040	34.25	1.37	30.60	1.22
Total				11.65		13.22

HOG SCALES—SH 3-9

(Gov't Ex. 30, p. 461)

			MATERIAL Unit Price	MATERIAL Total	LABOR Unit Price	LABOR Total
Scale Enclosure—						
#8 wire, 1½"x1½" mesh, framed 1" channels, 2'6"x1'0"—3'0"x7'4"—2'3"x 1'4"—11'4"x0'6" — 4'0"x3'6" — 4'0"x 4'8"—3'10" 10'8"	s.f.*	107	0.45	48	0.05	5
Door, same, 2'2"x6'2", 4" strap hinges, hinge hasp	ea*	1	7.00	7	2.00	2
Door, same, 2'6"x6'4"	ea*	1	7.00	7	2.00	2
Shelves	ea	2	1.00	2	.....	.....
Pigeon holes	ea	1	1.00	1	.....	.....
Drawer cabinet	ea	1	2.50	3	.....	.....
6" moulding	ft.*	9	0.12	1	0.10	1
8" moulding	ft.*	10	0.15	2	0.10	1
Painting	sqs.*	5	1.00	5	2.00	10
12" brass gong and cord	ea	1	12.00	12	1.00	1
1" lbr. bench 8' long	ea	1	3.00	3	.....	.....
4 drawers	lot	1	4.00	4	.....	.....
Scale Pit and Platform—						
Excavation—Pit SH3-9	c.y.*	253	.....	.....	0.64	162
Paving, 6" concrete	s.y.*	108	0.84	91	0.26	28
Concrete in Walls & Pedestals						
Concrete	c.y.*	46.8	5.24	487	1.35	123
Forms—Wall	s.f.*	2927	0.05	146	0.10	293

DOCKET 450

Before The

RESPONDENTS EX. 15

SECRETARY OF AGRICULTURE
ACTUAL CASH EXPENDITURES FOR
DEVELOPMENT COST OF THE DENVER MARKET

Item No.	Date	Grantee	Zone No.	Property Granted	Actual Cost To Yard Company	Column I First Cost	Value Per Acre Adding Carrying Costs	Column II Total Value Including Cost of Carrying to Date Given
1	Jan. 24, 1891	Colo. Pkg. Co.	1	11.158 Acres	$ 4,375.00	$ 48,816.25	$ 5,028.33	$ 56,106.11
2	Jan. 24, 1891	Colo. Pkg. Co.		Machinery & Equipment	25,000.00	25,000.00	.....	25,000.00
3	Feb. 16, 1898	Decker & Degan		123 Shares	100.00	12,300.00	.....	12,300.00
4	Apr. 9, 1902	Western Pkg. Co.	1	7.262 Acres	4,375.00	31,771.25	7,962.50	57,823.68
5	Apr. 9, 1902	Western Pkg. Co.		Cash	100,000.00	100,000.00	.....	100,000.00
6	Feb. 10, 1903	Chas. Burkhardt	4	1.536 Acres	4,375.00	6,720.00	8,181.25	12,536.40
7	Feb. 10, 1903	Chas. Burkhardt		Cash	4,000.00	4,000.00	.....	4,000.00
8	May 19, 1905	C. B. & Q. R. R.	2	.50 Acres	4,375.00	2,187.50	8,771.87	4,385.94
9	Oct. 17, 1905	Western Pkg. Co.	1	.46 Acres	4,375.00	2,012.50	8,881.25	4,085.38
10	June 25, 1913	Coffin Pkg. Co.	4	1.78 Acres	4,375.00	7,787.50	10,915.62	19,429.80
11	Nov. 22, 1916	Western Pkg. Co.	1	1.431 Acres	4,375.00	6,260.63	11,812.50	16,903.70
12	Dec. 15, 1917	Coffin Pkg. Co.	4	.308 Acres	4,375.00	.....	12,075.00	2,419.10
13	Feb. 19, 1918	Union Pacific	1	.362 Acres	4,375.00	1,583.75	12,118.75	4,386.99
14	Dec. 18, 1919	C. B. & Q. R. R.	2	2.05 Acres	3,000.00	6,150.00	3,000.00	6,150.00
		TOTAL		26.847 Acres		$254,589.38		$325,547.10

111

RESPONDENTS EX. 1

Before the

SECRETARY OF AGRICULTURE

RECEIPTS AND SALES OF LIVESTOCK AT THE DENVER MARKET

FOR THE YEARS
1913 to 1934 INCLUSIVE.

	CATTLE			CALVES		
YEAR	RECEIPTS	SALES	%	RECEIPTS	SALES	%
1913	448,758	229,061	51	50,450	28,938	57
1914	406,903	225,965	56	35,835	17,817	50
1915	395,922	235,779	59	28,419	16,553	58
1916	552,121	348,766	63	49,339	35,509	72
1917	616,017	399,159	64	37,360	32,593	87
1918	675,702	484,357	72	52,566	42,625	81
1919	766,098	513,315	67	57,629	48,591	84
1920	570,360	363,186	63	46,205	37,252	80
1921	436,490	328,783	75	45,012	41,890	93
1922	586,730	431,436	74	69,515	57,719	83
1923	561,261	455,232	81	58,621	52,648	90
1924	571,703	468,747	82	58,650	59,627	102
1925	526,625	431,766	82	60,222	56,989	95
1926	472,654	396,519	83	56,397	53,209	94
1927	577,004	481,964	83	63,163	53,442	85
1928	590,382	454,008	77	76,819	59,656	78
1929	555,588	461,796	83	68,479	61,567	90
1930	505,169	433,275	86	87,726	72,989	83
1931	439,562	381,915	87	64,354	58,224	90
1932	365,318	329,090	90	59,316	46,802	79
1933	347,619	321,642	93	70,601	53,379	76
1934	633,074	488,012	77	132,343	113,139	85

	HOGS			SHEEP		
YEAR	RECEIPTS	SALES	%	RECEIPTS	SALES	%
1913	246,598	245,438	99	620,431	240,483	39
1914	255,636	257,176	101	692,247	288,655	42
1915	343,653	339,439	99	765,170	445,532	58
1916	466,653	464,057	99	1,409,009	898,531	64
1917	351,903	352,940	100	2,059,898	1,366,269	66
1918	383,543	384,290	100	1,651,759	1,114,554	67
1919	367,634	370,025	100	2,087,152	1,406,382	67
1920	341,240	339,192	99	2,078,688	1,467,491	70
1921	334,094	327,177	98	1,467,911	1,029,046	70
1922	395,219	390,176	99	1,866,784	986,820	53
1923	495,292	471,060	95	1,856,578	947,085	51
1924	569,038	540,110	95	2,039,660	1,135,882	55
1925	467,407	445,147	95	2,357,010	1,423,140	60
1926	497,047	450,489	90	1,825,922	1,211,843	66
1927	456,917	407,484	89	1,908,316	1,120,758	60
1928	567,227	522,861	92	2,295,034	1,557,022	68
1929	538,524	488,741	91	2,290,395	1,512,504	66
1930	512,322	434,203	89	2,061,877	1,560,929	76
1931	597,156	464,723	77	2,498,888	1,850,297	74
1932	651,890	487,237	75	2,833,821	2,196,542	78
1933	771,064	542,365	70	2,902,316	2,060,678	71
1934	709,066	451,228	64	3,108,655	2,376,234	76

EXTRACT FROM
GOVERNMENT EXHIBIT 41

Supplement to Audit for Rate Making Purposes
Pages 1 to 7 inclusive

Profit and Loss Statement
Showing Adjusted Net Income
For Rate Making Purposes.

	Five Year Total	1934	1933	1932	1931	1930
Gross Income per Audit	4,496,099.98	1,031,507.96	769,188.88	796,456.11	920,518.35	978,428.68
Less—Eliminations	337,599.35	223,624.76	35,550.65	24,825.82	27,416.64	26,181.48
Adjusted Total Income	4,158,500.63	807,883.20	733,638.23	771,630.29	893,101.71	952,247.20
Gross Expenses Per Audit	3,461,951.70	742,912.49	590,325.41	629,408.22	727,411.29	770,894.29
Less—Eliminations	845,525.23	233,228.48	158,280.28	147,626.26	156,346.59	150,043.62
Adjusted Total Expenses	2,616,426.47	510,684.01	432,045.13	481,781.96	571,064.70	620,850.67
Net Income (Before Federal tax)	1,542,074.16	297,199.10	301,593.10	289,848.33	322,037.01	331,396.53
Deduct Federal Taxes	200,600.11	40,864.89	41,469.05	39,854.15	38,644.44	39,767.58
Net Income	1,341,474.05	256,334.30	260,124.05	249,994.18	283,392.57	291,628.95
One Year Average	268,294.81	.....	.....	.....	.....	.....

INCOME ELIMINATIONS

	Five Year Total	1934	1933	1932	1931	1930
Yardage on Drouth Receipts	85,198.30	73,919.54	11,278.76	.....	.....	.....
Hay Sales " "	104,527.10	101,918.00	2,609.10	.....	.....	.....
Corn " " "	1,541.10	.....	1,541.10	.....	.....	.....
Loading & Unloading a/c Drouth	13,078.00	12,849.00	229.00	.....	.....	.....
Weighing	4,141.00	4,141.00	.....	.....	.....	.....
Income from RR Tracks	55,506.67	11,363.17	11,042.93	11,001.32	10,712.61	11,386.64
Feed Lot Rental	3,603.00	620.00	706.00	759.00	759.00	759.00
Livestock Show—Stadium Rent	5,475.00	5,475.00	.....	.....	.....	.....
Miscellaneous Stadium Rents	4,429.75	.....	.....	.....	2,500.00	1,929.75
Interest	34,775.51	6,308.67	5,362.65	8,984.13	7,641.92	6,478.14
Dividends Received	5,886.13	845.00	573.75	812.50	1,879.88	1,775.00
H & M Div'n. & Stock Show Property	16,073.71	3,246.90	2,088.96	3,125.12	3,759.78	3,852.95
Miscellaneous—Facilities at Show for Feeding	486.35	60.75	118.40	143.75	163.45	.....
Branding & Dehorning (Gov't Cattle)	2,450.16	2,450.16	.....	.....	.....	.....
Misc. Yard Revenue (Gov't Cattle)	652.57	652.57	.....	.....	.....	.....
Less—Adjustment						
Misc. Income from Gen'l S. Y. Corp'n in 1934 included in surplus item of $456.00—page 8—should be in current Income Account	225.00	225.00	.....	.....	.....	.....
Total	337,599.35	223,624.76	35,550.65	24,825.82	27,416.64	26,181.48

EXPENSE ELIMINATIONS

	Five Year Total	1934	1933	1932	1931	1930
Cost of Hay (Gov't cattle & Hogs)	56,803.85	55,519.37	1,284.48			
Cost of Corn " " "	787.67		787.67			
Labor—Loading & Unloading (Gov't)	3,467.65	3,467.65				
" Branding & Dehorning "	2,666.52	2,666.52				
" Feeding "	2,546.14	2,546.14				
" Watering "	1,730.42	1,730.42				
" Cleaning "	3,454.75	3,454.75				
" Weighing "	982.16	982.16				
" Tying Bulls "	19.95	19.95				
Water "	1,712.66	1,712.66				
Material and Supplies "	1,156.38	968.60	187.78			
Light & Heat "	232.58	232.58				
Casualty Insurance "	509.55	509.55				
Company Barn "	651.78	651.78				
Repairs "	877.65	435.10	442.55			
Insurance, Fire, etc.—Stadium	2,056.88	383.36	388.50	421.20	421.20	442.62
" Cattle Wash House	28.42	6.98	6.32	5.04	5.04	5.04
" S. S. Hog Barn	439.31	77.47	82.60	105.48	105.48	68.28
" Auction Barn	100.93	2.18	21.10	26.88	26.88	23.89
" Boiler House—S. S. Property	94.03	14.13	16.60	20.48	20.48	22.34
" Club House	221.25	44.25	44.25	44.25	44.25	44.25

Federal Tax on Bonds	2,818.72	590.00	583.48	595.18	546.87	502.19
Real Estate and Property Taxes	39,388.44	6,913.59	7,102.45	7,796.03	8,468.48	9,107.89
Depreciation Per Books	270,212.57	54,823.60	54,031.99	53,931.31	54,247.37	53,178.30
Interest on Bonds	348,242.37	66,242.37	69,375.00	70,125.00	70,875.00	71,625.00
Interest—Miscellaneous	698.98	.....	.....	19.37	679.61	.....
Bond Discount & Expense	16,572.39	3,190.56	3,252.48	3,314.52	3,376.47	3,438.36
Repairs—RR Tracks	177.92	37.50	73.10	11.86	44.68	10.78
Federal Income Tax per Books	148,337.91	42,982.48	27,182.48	25,013.58	25,472.48	27,686.89
H & M Div. and S. S Property	31,673.66	6,308.24	4,332.49	3,969.81	8,075.03	8,988.09
Dues, Donations & Subscriptions	14,836.49	3,600.59	2,900.28	2,786.11	2,604.56	2,944.95
Cleaning Expense a/c Stock Show	201.93	.....	.....	.....	.....	201.93
Fiscal Agents, Registrar & Trustee	4,046.46	1,168.85	710.16	722.36	726.51	718.58
Rate Hearings—I. C. C.	19,684.96	1,044.39	14,543.02	4,076.55	1.35	19.65
Rates & Charges—P & S	43,934.38	6,069.21	6,100.00	9,809.75	15,773.34	6,182.08
Sub-Total	1,021,367.71	268,396.98	193,448.78	182,794.75	191,515.08	185,212.11
Less—Adjustments						
Depreciation Expense	166,000.00	33,200.00	33,200.00	33,200.00	33,200.00	33,200.00
Rate Hearing—I. C. C.	9,842.48	1,968.50	1,968.50	1,968.50	1,968.49	1,968.49
Total Adjustments	175,842.48	35,168.50	35,168.50	35,168.50	35,168.49	35,168.49
NET TOTAL	845,525.23	233,228.48	158,280 28	147,626.26	156,346.59	150,043.62

THE DENVER UNION STOCK YARD COMPANY

Dues, Donations and Subscriptions Expense

	1934		1933		1932		1931		1930	
	Total	Allowed	Total	Allowed	Total	Allowed	Total	Allowed	Total	Allowed
Denver Community Chest	1,000.00	.....	1,250.00	.....	783.00	.....	1,100.00	.....	1,000.00	.....
Denver Chamber of Commerce	240.00	.....	240.00	.....	450.00	.....	450.00	.....	450.00	.....
U. S. Chamber of Commerce	50.00	.....	25.00	.....	75.00	.....	25.00	.....	25.00	.....
Junior Chamber of Commerce	15.00	.....	.....	.....	.....	.....	.....	.....	.....	.....
Tickets and Boxes—Stock Show	395.50	.....	120.25	.....	640.75	.....	349.75	.....	396.00	.....
American Stockyards Association	832.56	.....	763.28	.....	.....	.....	.....	.....	.....	.....
Church Donations	115.00	.....	64.00	.....	79.00	.....	89.00	.....	81.39	.....
Flowers	4.00	4.00	46.50	46.50	29.00	29.00	17.55	17.55	.....	.....
United Appeal	75.00	.....	25.00	.....	50.00	.....	.....	.....	.....	.....
Volunteers of America	10.00	.....	20.00	.....	25.00	.....	5.00	.....	10.00	.....
Veteran Volunteer Firemen	5.00	.....	5.00	.....	.....	.....	3.00	.....	2.75	.....
Firemen's Protective Association	15.00	.....	10.00	.....	10.00	.....	10.00	.....	.....	.....
Denver Traffic Club	18.00	.....	18.00	.....	18.00	.....	18.00	.....	20.00	.....
Denver Commercial Traffic Club	18.00	.....	13.50	.....	13.50	.....	18.00	.....	18.00	.....
I. C. C. Traffic Reports	25.25	25.25	10.50	10.50	17.00	17.00	18.00	18.00	15.75	15.75
Traffic Service Corp.	10.00	10.00	10.00	10.00	10.00	10.00	10.00	10.00	20.00	20.00
Brand Inspectors—Christmas	70.00	.....	35.00	.....	40.00	.....	65.00	.....	65.00	.....
Denver Live Stock Exchange	95.53	.....	106.75	.....	116.85	.....	156.10	.....	152.00	.....
Denver Post	12.00	12.00	12.00	12.00	12.00	12.00	12.00	12.00	12.00	12.00
Rocky Mountain News	.....	.....	12.00	12.00	12.00	12.00	24.00	24.00	.....	.....
Tax Payers Review	5.00	5.00	5.00	5.00	3.00	3.00	.....	.....	.....	.....
Policemen's Protective Association	50.00	.....	50.00	.....	50.00	.....	50.00	.....	.....	.....
Y. M. C. A.	.....	.....	.....	.....	25.00	.....	50.00	.....	.....	.....
Christmas Party—Exchange Building	.....	.....	.....	.....	24.71	.....	38.21	.....	27.45	.....
Lunches at Auction	55.00	55.00	.....	.....	.....	.....	.....	.....	.....	.....
4-H Club Luncheon, etc.	34.00	34.00	.....	.....	.....	.....	.....	.....	.....	.....
Traffic Red Book	8.00	8.00	.....	.....	.....	.....	10.00	10.00	.....	.....

Stockyards Bowling Team			10.00		5.00				10.00	
Greeley Bowling Tournament			7.50							
Cigars & Candy, Meals, etc			11.50	11.50	30.20	30.20	9.25	9.25		
Old Folks Home	10.00		5.00		5.00					
City Directory			19.00	19.00	15.00	15.00	19.00	19.00		
Christmas Seals	1.00		1.00							
American Red Cross							50.00			
National Jewish Hospital					50.00		50.00			
Little Ssiters of the Poor					5.00		10.00			
Rescue Mission	2.50		7.00				15.00			
Lamb Feeders Association			20.00	20.00					200.00	200.00
Banquet—Judging Team					25.00	25.00	146.50	146.50	90.12	90.12
Dinner—Market Agencies					88.30					
Music—Stock Show a/c Boys and Girls					175.00	175.00				
Veterans of Foreign Wars			5.00		5.00					
Chicago Drovers Journal Yearbook	1.00	1.00	1.00	1.00	.50	.50			1.00	1.00
Rev. Bridwell			15.00						20.00	
Church Messenger	11.00									
Joint Labor Day Committee	10.00									
Denver Tourists Bureau	100.00									
Wedding Gift	250.00									
Gents Driving & Riding Club	10.00									
Colorado Womens College	100.00									
International Vet. Congress	25.00									
Police & Sheriffs Association	25.00									
Federal Income Tax Service	66.00	66.00								
Western Legionnaire	5.00									
Letter Carriers—Donations	5.00									
National Federation of Federal Employees	11.00									

Dues, Donations and Subscriptions Expense—Continued—

	1934		1933		1932		1931		1930	
	Total	Allowed	Total	Allowed	Total	Allowed	Total	Allowed	Total	Allowed
American Legion	5.00									
Program—Holy Name Basket Ball	5.00									
Office Employees—Hay Ride, etc.	3.00	3.00								
Guidman Community Center	2.50									
President's Ball—Tickets	18.00									
Lakeside Unemployed			1.00							
Colo. State Board Immigration (World's Fair Adv. Tokens)			24.00							
Water Survey			100.00	100.00						
Beth David Sisterhood			2.00							
Newspapers			.90	.90						
Denver Democrat—Paper			2.00							
Colo. Travel Industry—Committee			50.00							
City Charter—Labor Rate Amend.			25.00							
List—Open and Prepay Stations					2.00	2.00				
Jewish Home—Hospitals					4.00					
Tickets—National Guard					2.50		2.50			
Tickets—Firemen's Ball, etc.					5.00				23.75	
J. H. Meal & Sons-McWilliams-Flowers					5.00	5.00				
Mrs. Phelix Royenski—Tickets					5.00					
Denver Press Club					25.00					
Citizens Employment Comm.					150.00					
Breeders Gazette					1.00	1.00				
Livestock Producers & Feeders Assn.					11.20	11.20				
Copy—Sixty Years Cheyenne					.50					
Tax Payers, Inc.					25.00					
Directors' Dinner					20.50	20.50				
Bro. Serv. Prog. (Valley of Colo. Orient)					5.00					

Rocky Mtn. Police Journal					5.00						
Jewish Consumptive Relief Assn.							25.00				
Old Former Employees							20.00	20.00			
Vets. Wrestling Tickets							5.00				
Tickets (Misc. no explanation)							20.00				
Donation—Employees							1.93	1.93			
The Producer Magazine							2.75	2.75			
D. & R. G. Bond—½ Cost							62.50	62.50			
War Mothers									4.50		
M. L. Moore—Employee									5.00		
St. Joseph Carnival—Church									5.00		
Fitzsimons Hospital									14.24		
Cash—No. Detail									5.00		
Entertain-American Nat'l L. S. Assn.									137.50		
Sweepstakes Steer—Prize									50.00	50.00	
The Colorado Association									400.00		
Public Utility Reports									8.25	8.25	
Columbus Day Year Book									10.00		
U. S. Marshals Convention									13.75		
Policemen's Ball									48.62		
	3,823.84	223.25	3,148.68	248.40	3,154.51	368.40	2,958.04	353.48	3,342.07	397.12	
		3,600.59		2,900.28		2,786.11		2,604.56		2,944.95	
Disallowed—		3,823.84		3,148.68		3,154.51		2,958.04		3,342.07	

RESPONDENTS EX. 13
DOCKET 450.
Before the
SECRETARY OF AGRICULTURE
THE DENVER UNION STOCK YARD COMPANY
COMPARISON OF DECEMBER, JANUARY AND FEBRUARY
EARNINGS OF
The Denver Union Stock Yard Company for the Years 1930 to 1935, inclusive.
(December Earnings are for December, just previous to year shown.)

	1930	1931	1932	1933	1934	1935
December	$10,000.85	$17,862.26	$ 7,345.57	$4,144.84	$15,898.36	$1,541.87
February	10,018.09	5,731.31	8,062.46	3,076.25	4,167.67	1,199.08
Total	$20,018.94	$23,593.57	$15,408.03	$1,068.59	$20,066.03	$ 342.79
Average	$10,009.47	$11,796.78	$ 7,704.01	$ 534.29	$10,033.01	$ 171.39
January	$28,573.00	$32,780.46	$13,917.45	$6,564.26	$18,378.57	$8,176.69
Increase January over average	$18,563.53	$20,983.68	$ 6,213.44	$7,098.55	$ 8,345.56	$8,348.08
Total Excess January over December & February Average	$69,552.84					
Average per year	$11,592.14					
Yardage on Pure Bred Bulls						
January	$ 1,403.00	$ 1,639.00	$ 1,190.00	$ 833.00	$ 835.00	$1,051.00
February	41.00	.....	69.00	.....	7.00	.....
Total	$ 1,444.00	$ 1,639.00	$ 1,259.00	$ 833.00	$ 842.00	$1,051.00

BEFORE THE

SECRETARY OF AGRICULTURE

DOCKET 450

Respondent's Ex. J

EXHIBIT BRINGING UP TO DATE RESPONDENT'S EX. 13, SHOWING EXCESS OF RESPONDENT'S JANUARY EARNINGS OVER THE AVERAGE OF DECEMBER AND FEBRUARY, CAUSED BY THE STOCK SHOW HELD DURING JANUARY OF EACH YEAR.

Note: Ex. 13 shows the six years 1930 to 1935 inclusive.

December 1935 earnings	$ 8,746.46
February 1936 earnings	6,229.22
Average	7,487.84
January 1936 earnings	24,559.52
Excess of January over average	$17,071.68

Supplementing Respondent's Ex. 14, The National Western Stock Show paid rent for the stadium property of $7,000.00 for the 1935 show and $7,000.00 for the 1936 show.

Plaintiff's Ex. 1.

IN THE

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLO.

THE DENVER UNION STOCK YARD CO.,
Plaintiff,
vs.
UNITED STATES OF AMERICA, AND THE SECRETARY OF AGRICULTURE,
Defendants.

IN EQUITY NO. 10913

EXHIBIT SHOWING HIGHER INCOME OF PLAINTIFF DURING JANUARY 1937 COMPARED TO AN AVERAGE OF DECEMBER 1936 and FEBRUARY, 1937, CAUSED BY THE STOCK SHOW HELD IN JANUARY 1937, AND BRINGING UP TO DATE RESPONDENT'S (PLAINTIFF'S) EX. NO. 13 and NO. J.

Net adjusted earnings for December 1936	$ 6,935.57
Net adjusted earnings for February 1937	8,642.93
Total	$ 15,578.50
Average per month	7,789.25
Net adjusted earnings for January 1937	$ 22,030.97
Excess of January over December—February average	$ 14,241.72

Total excess on above basis for January over previous December and following February for six years 1930 to 1935 inclusive as shown by Respondent's Ex. 13	$ 69,552.84
Total excess for January 1936 over December 1935 and February 1936 as shown by Respondent's Ex. J	17,071.68
Total excess for January 1937 as shown above	14,241.72
Total for eight years 1930 to 1937 incl.	$100,866.24
Average per year for eight years	12,608.28

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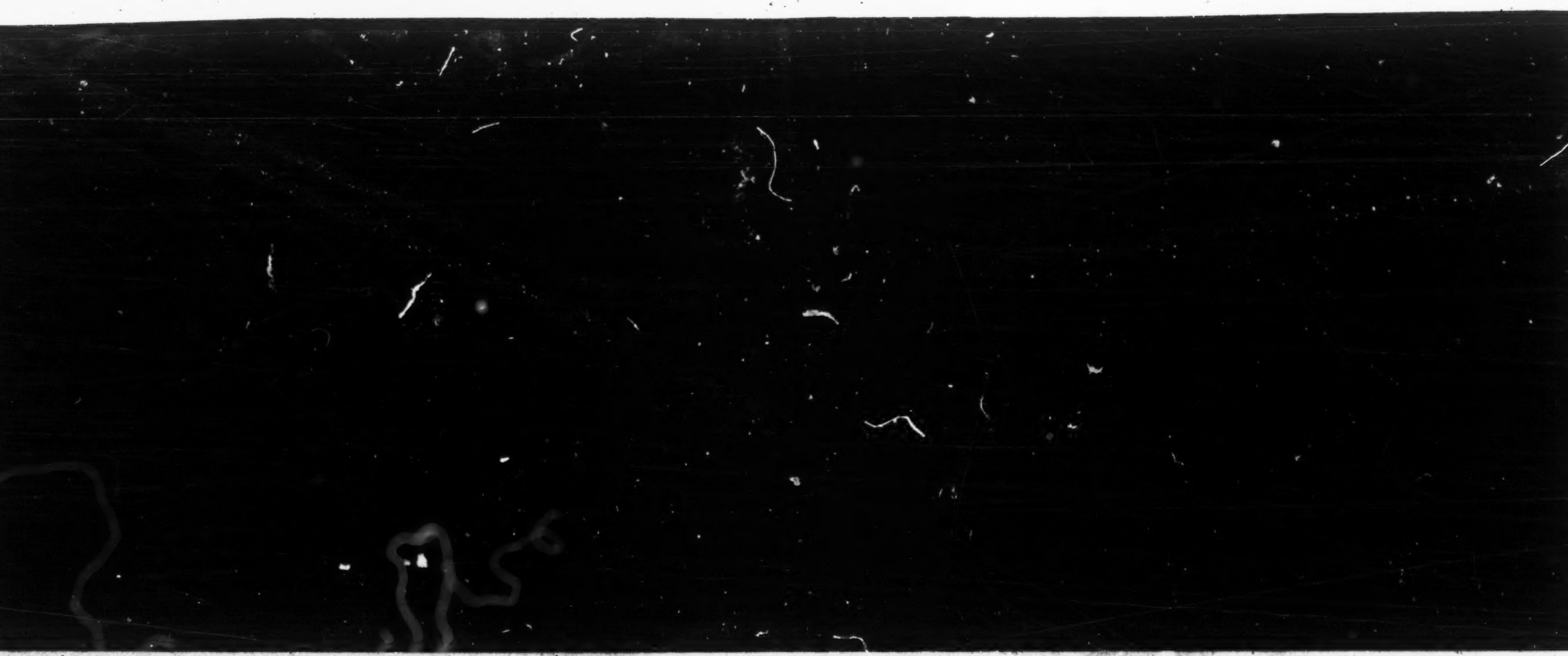
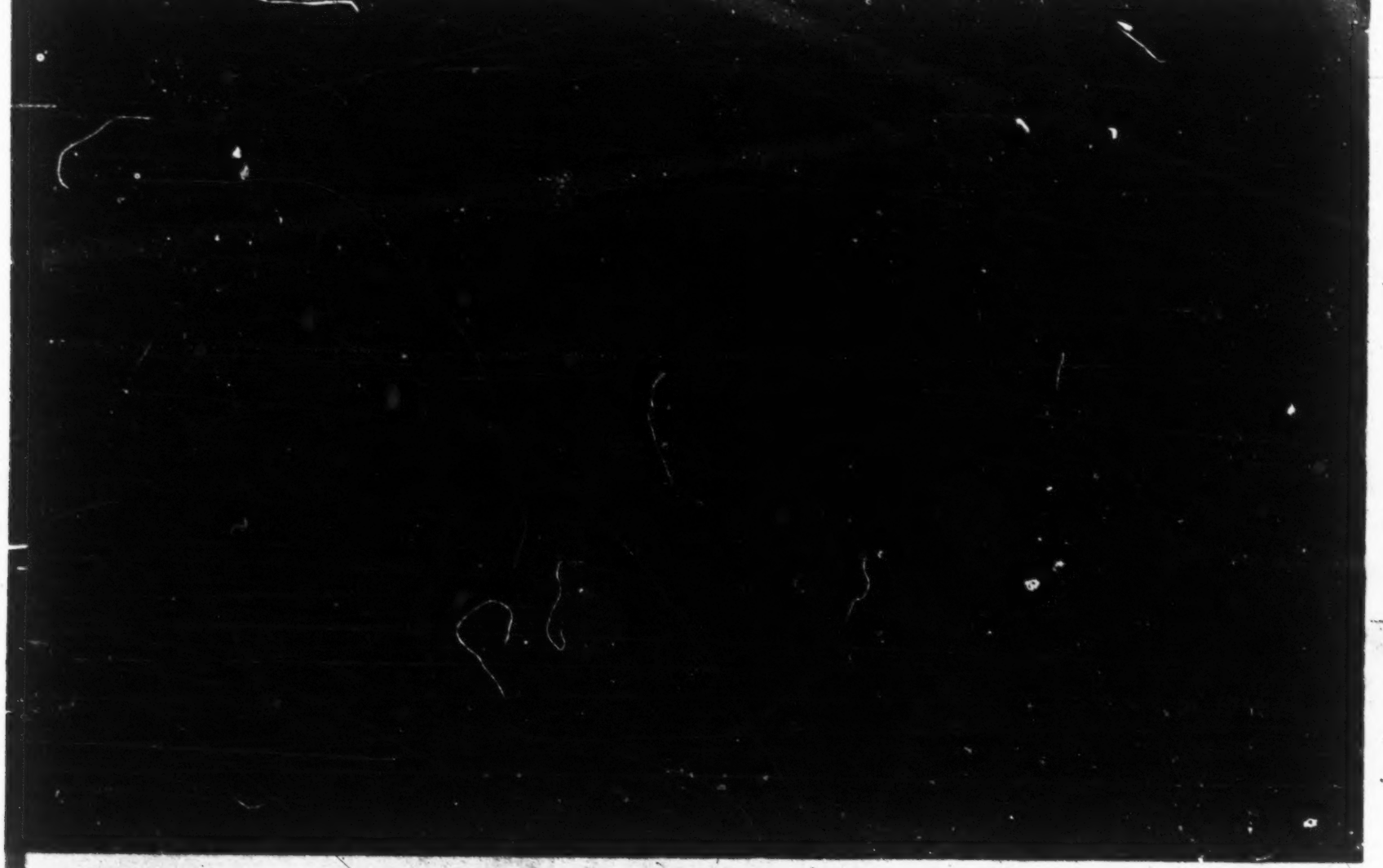


LEGEND --- GREEN INDICATES PROPERTY ALLOWED AS USED AND USEFUL.
RED " " ONE HALF ALLOWED AS USED AND USEFUL.
YELLOW " " NOT ALLOWED AS USED AND USEFUL.
I " SEWER OUTLETS TO RIVER



USEFUL.
USED AND USEFUL.
AND USEFUL.